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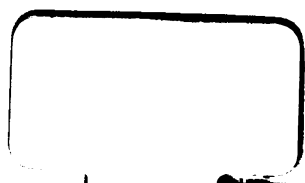
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# Insolvency and Assignment Laws

—OF—

## CALIFORNIA

ANNOTATED

ALSO CONTAINING A SYNOPSIS OF SIMILAR LAWS OF

OREGON

NEVADA

ARIZONA

WASHINGTON

UTAH

NEW MEXICO

IDAHO

WYOMING

OKLAHOMA

MONTANA

COLORADO

WITH ANNOTATIONS

And One Hundred Forms for Use in California Practice

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By **W. F. HENNING, Esq.**

OF THE CALIFORNIA BAR

*The Appendix contains the California Insolvent Acts of 1852 and 1880, and as much of the U. S. Bankruptcy Act of 1867, as is pertinent to the notes of decisions in Bankruptcy cases.*

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LOS ANGELES, CAL.  
CHAS. W. PALM CO.  
1895

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THOMAS HENNING

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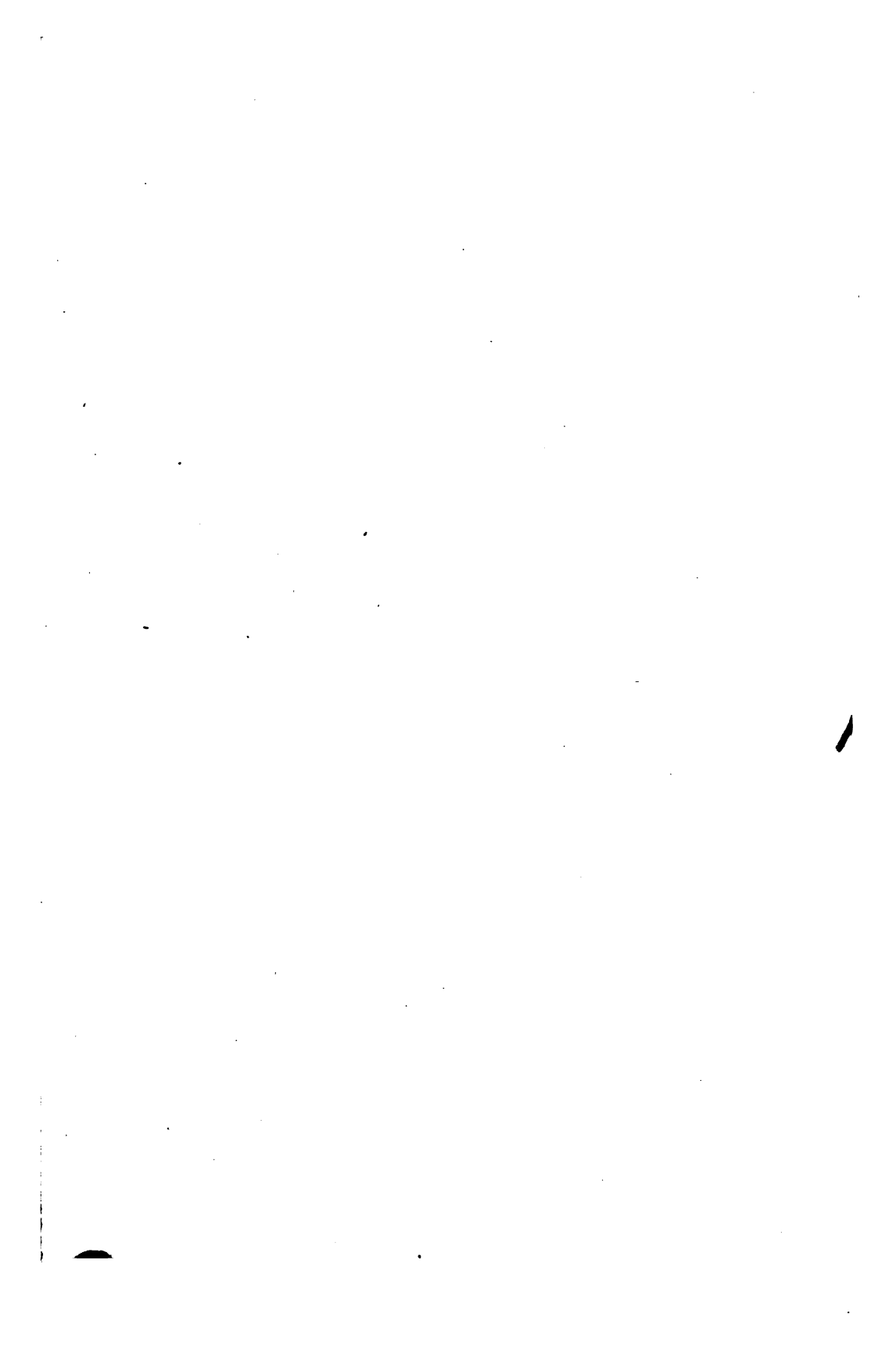
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## INTRODUCTION.

It seems to have been common practice among all the ancients to have the person of the debtor taken in satisfaction of his debt; among even the enlightened nations of Greeks, the Egyptians, Hebrews and Romans, the debtor was sold into slavery or taken into bondage by the creditor. Among the Romans, severe tortures and even death were sanctioned in the prosecution of the demands of the creditor. Among the Hebrews, the obligation of debt descended from father to son, as it does now in some, if not all of the Oriental nations. The Hebrew code, however, contained an insolvency law in the nature of an universal discharge granted every seventh year. "At the end of every seven years thou shalt make a release. And this is the manner of the release: Every creditor that lendeth ought unto his neighbor shall release it; he shall not exact it of his neighbor nor of his brother; because it is called the Lord's release. Of a foreigner thou mayest exact it again." Deut. xv, 1-3.

And the year of Jubilee also was established, being every fiftieth year: "In the year of this Jubilee ye shall return every man unto his possession. And if thou shalt sell ought unto thy neighbor, or buyest ought of thy neighbor's hand, ye shall not oppress one another." Levit. xxv, 9-30.

We are told that the first English bankruptcy act is found in 34 and 35 Hen. VIII, Ch. 4, and that it has always been a feature of the law that the estate of the bankrupt was taken by public authority and distributed ratably among his creditors.

Provision for the relief of bankrupts from their debts (a discharge in bankruptcy), was first introduced by the statute of 4 Anne, Ch. 17; and in 1825, (6 Geo. IV, Ch. 16), provision was first made for "deeds of arrangement" whereby the purpose of distributing the debtor's effects ratably among his creditors was accomplished without his going through bankruptcy proceedings, but the assent of all the creditors was practically required for the operation of the deed if a discharge from further liability was contemplated, for although a composition or deed of arrangement might be accepted by a specified majority in number and value of the creditors, and the commission in bankruptcy be superceded, yet this would not discharge the debtor from payment in full of the claims of the non-consenting creditors. By the Act of 12 and 13 Vict., Ch. 106, (1849), a debtor was enabled to place himself and his estate under protection of the court, without an actual bankruptcy proceeding, for the purpose of effecting a com-

position or arrangement with his creditors, which would be binding on all his creditors provided he obtained the assent of certain majorities. The same act also provided for a composition in bankruptcy proceedings, which if accepted by nine-tenths of the creditors after the last examination of the bankrupt, the bankruptcy proceedings might be annulled; but the courts interpreted the act to require a complete cession of the bankrupt's estate.

The Act of 24 and 25 Vict. (1861), provided a limited period within which the debtor might obtain the assent of his creditors to a composition, without involving himself in bankruptcy proceedings, and without a cession of his estate; and a majority in numbers and three-fourths in value of the creditors was sufficient to bind the minority to the terms of such composition. The privileges of this Act are said to have been abused, so that by the Act of 31 and 32 Vict. Ch. 104, (1868), a full and complete discovery was required of the debtor, and creditors were required to prove their debts by affidavit, and the non-assenting creditors were enabled to ascertain the real condition of the debtor's assets, and to scrutinize the debts or claims against him. The English Act of 32 and 33 Vict. Ch. 71, (1869), contains provisions for "liquidation" and "composition" without resort to regular bankruptcy proceedings. In "liquidation" by arrangement of the affairs of the debtor, all the property of the debtor is vested in a trustee selected by the creditors, to be administered in the same way as in bankruptcy. It is, in short, bankruptcy without a petition or adjudication, and is based upon the action of a majority in number and three-fourths in value of creditors, in meeting held for the purpose, and the majority of three-fourths in value includes all debts, but as to the majority in number, debts of ten pounds and less are not reckoned. If it be shown to the court that this arrangement or composition cannot be carried out without injustice or undue delay, the court will declare the debtor a bankrupt, and proceed to administer his estate accordingly.

As to compositions in bankruptcy proceedings, the American Bankruptcy Act as amended in 1874, was very similar to the English Act of 1869. The American Act required that there shall be bankruptcy proceedings pending, in order to effect a composition, while composition could be effected in England without such proceedings, and there are differences in the modes of procedure.

Frequent allusion has been made to a distinction between "bankruptcy" and "insolvency," and this matter may be satisfactorily explained as follows:

It seems that the early English bankruptcy acts applied only to traders or merchants, and when such persons became unable to pay their debts, (certain tests of which inability, called acts of bankruptcy, were assumed as conclusive), on the application of a creditor, the court took forcible possession of his property and assets of every kind, and converted them into money, which was then distributed ratably among the creditors. These proceedings included proof of the debts, examination of the debtor, and, after the statute of 4 Anne, a discharge of the debtor, not only from imprisonment, but also from future liability as to those debts.

Insolvency was a term applied to professional men, gentlemen, and all others who were not merchants or traders. Such persons were subject to imprisonment for debt, and while they might petition the insolvency court before being imprisoned, it seems that the application was seldom made until extorted by the certainty of the loss of personal liberty. Insolvency differed from bankruptcy in the fact that in the former the application was to be made only by the debtor, while in the latter it proceeded only from the creditor. The protection of the insolvency court was granted to this class of unfortunate individuals only upon their making a cession of their entire estate and a full statement of all their debts and liabilities. If they did this satisfactorily they would be discharged from prison, but not from future liability to pay the debts; and hence there was maintained a permanent and marked distinction in that country between bankruptcy, which applied to traders, was instituted on petition of a creditor and resulted in a discharge from future liability, and insolvency, which applied to all others than traders, was initiated by petition of the debtor, and only relieved from imprisonment.

This distinction is, in a measure, still preserved in some of the United States. New Jersey, Pennsylvania, Arkansas, and perhaps a few others, still have an "Insolvent Debtor Law," which contemplates an assignment of all the debtor's property, and his release from arrest or imprisonment, but no discharge from future liability. In fact, a considerable majority of the states have not, strictly speaking, any provision for an absolute discharge of the debtor, as was provided by the U. S. Bankruptcy Act, and the Insolvency laws of California. In some the discharge is granted upon the consent of a majority, or of all the creditors, and in some a discharge is granted when the estate of the debtor realizes seventy per cent. of his indebtedness.

Imprisonment for debt being practically abolished, the distinction between bankruptcy and insolvency is also vanishing to the same extent that a discharge from debt is granted by so called insolvency laws. The early laws in the colonies and the states, the reason, purpose and effect of the constitutional provision as to bankruptcy, and the relative authority of the general government and of the states on the subject, are discussed in a most interesting manner in the arguments of counsel and the decision of Chief Justice Marshall, in *Sturges v. Crowninshield*, 4 Wheat. 122, *et seq.*, and in cases cited in the note under the same case in *Lawyers Co-operative Ed.*, book 4, pages 529 *et seq.* It may be accepted as a safe rule that where the statute contemplates the surrender or the taking of the debtor's estate and its ratable distribution among creditors proving their claims, and a discharge of the debtor from all further liability as to those debts, it meets the English theory of bankruptcy; for since the statute of 24 and 25 Vict. (1861), bankruptcy applies to all classes of persons, and not, as formerly, to traders or merchants only. By that statute the insolvency court was abolished, and in this country it is now generally understood, though not universally, as will be seen by reference to various decisions and the statutes of several states, that a statute embracing these features is one on the subject of "bankruptcy," although it be called an "insolvency" act. *Cohn v. Barrett*, 6 Cal. 195.

It is unnecessary to refer to the numerous authorities to the effect that the constitutional provision has conferred upon Congress the right to exclusively control and regulate the subject of bankruptcy, and that while an act of Congress is in force on this subject, all state legislation on the same subject is in abeyance. *Boedefeld v. Reed*, 55 Cal. 299, and *Lewis v. Santa Clara County* *Id.* 604.

The unreasonable and often cruel practice of putting the debtor in prison, where he could neither earn support for himself or family, nor anything with which to pay the debt, nor otherwise secure release from the debt, has practically become obsolete; and yet the statement was recently made in a report to Congress that "the right of discharge is enjoyed by honest debtors living under every civilized flag except our own." There is no provision in our national constitution against imprisonment for debt, but such provision is contained in nearly all of the state constitutions, and the national constitution empowers Congress to pass "uniform laws on the subject of bankruptcy throughout the United States." There were statutes among the colonies

authorizing the release of the debtor from prison upon his making a cession of his property, and congress, as early as 1800, passed a bankruptcy act, which however was repealed in 1803. Congress did nothing more on the subject until 1841, and the act of that year was in turn promptly repealed, the repeal taking effect March 3, 1843. Nearly a quarter of a century elapsed before Congress passed another act (1867) and the latter act continued in force only until 1878, a period of less than a dozen years. It is not the purpose here to discuss the causes which have led to this fitful action on the part of the national government and which gave rise to the statement just quoted, to the effect that we are the only civilized nation which has not provided for a discharge to honest debtors.

The legislation of the several states on the subject of assignments for the benefit of creditors and insolvency, is so varied as to be incapable of being classed as a system. Some few states like California have acts drawn mainly on the same lines as the Bankruptcy Act of 1867. Although attempts at a uniform national system have heretofore proven unsatisfactory, it does not necessarily follow that a successful and satisfactory law cannot be framed and adopted. Boards of trade and other organizations as well as great numbers of individuals, representing all sections of the country have petitioned congress in behalf of new legislation on this subject, and a great amount of study and labor have been devoted to it, especially within the last two years. The Torrey bill, elsewhere alluded to, is the result so far, but whether or when, it will be enacted and whether it will fulfill the expectations of its advocates, are alike problematical.

Public policy requires that every man should be free to exercise his talent and industry for different reasons, of which the most important is, that he may properly maintain and instruct those dependent upon him, that they may not become charges upon the public. All are not alike strong, nor alert, and all are subject to misfortune and adverse circumstances. It is a wise policy of the law therefore which contemplates that certain property and means of livelihood shall be exempt from the demands of creditors, and that where all of the debtor's property, other than what is exempt, has been surrendered to his creditors, and the debtor has been honest, he should be released from his debts in order that he may go forward in the discharge of his obligations to his family and to society. Something more than a penal law forbidding the spilling of Christian blood, dictates that demands for a pound of flesh nearest the heart should be

thwarted; and not mercy, for which Portia so eloquently pleaded, but public welfare, demands a release from debts which cannot be paid in an ordinary manner, which are unconscionable, or which unreasonably impede the discharge of duties demanded of the individual by his family and society.

One object which I conceive should control all legislation on the subject of insolvency as well as other statutes for the collection of debts, should be the establishment of confidence between debtor and creditor, as well as a more perfect understanding among, and uniform protection to creditors. Litigation and legislation have both grown to prodigious proportions from the efforts of creditors to collect and of debtors to evade payment of debts which should never have been contracted; and also because of the distrust which has been permitted to grow up between the debtor and his creditor. Fraudulent conveyances and concealments grow out of this distrust, it is believed, to a greater extent than from any want of original honesty. We are often led to pity the infirmity of the man (though neither law nor good morals can excuse him) who realizes his approaching failure, and to protect those dependent upon him, resorts to cunning device, or perchance fraudulent scheme, in a disposition of his effects.

Under our present system, especially under recent legislation, both upon the subject of fraudulent transfers and insolvency, no debtor can feel justified in approaching a creditor for assistance, nor a creditor dare to extend assistance to a failing debtor. No one in ordinary business, with capital or debts exceeding three hundred dollars, can avoid "contemplation of insolvency" the moment he realizes that he is unable to pay his debts from his own means as they become due. Ordinarily, money only will be received in payment and though he has other means, he may not be able to convert them into money in time to meet a pressing creditor. He dares not make his condition known for fear of precipitating attachments with unknown costs, and no creditor, if approached, dare advance money and take security therefor. The confidence which would prompt the one or justify the other is rendered impossible by existing legislation, declaring such transaction void and justifying insolvency proceedings on the part of suspicious or nervous creditors. Consider section 59, of our Insolvency Act. "If any debtor being insolvent, or in contemplation of insolvency, within one month before the filing of a petition by or against him \* \* \* \* makes any payment, pledge, mortgage, assignment, transfer, sale or conveyance of any part of



his property, either directly or indirectly, absolutely or conditionally, to any one, the person receiving such payment, etc., having reasonable cause to believe that such debtor is insolvent and that such \* \* \* *payment, pledge, etc.*, is made with a view to prevent his property coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, etc. \* \* \* such *payment, pledge, etc.*, is void, and the assignee or the receiver may recover the property, or the value thereof, as assets of such insolvent debtor."

The Civil Code, section 3450, declares that "a debtor is insolvent, within the meaning of this title, when he is unable to pay his debts from his own means as they become due." In *Sarcey v. Lobree*, 84 Cal. 41, decided in 1890, our Supreme Court adopted the decision in *Washburn v. Huntington*, 78 *id.*, that the definition of insolvency given in the Civil Code, is applicable under the Insolvent Act, but also held that if the debtor has sufficient *means* to pay his debts, although he has not sufficient *money* in hand or in bank to meet them, or to pay a particular debt in *money*, when due, he is not insolvent. This decision was not concurred in by Chief Justice Beatty nor by Justice Thornton. The decision also seems to rest materially upon evidence that the debtor, although then under attachment, intended to pay all his debts, and did not "contemplate insolvency."

In the more recent case of *Clarke v. Mott*, 33 Pac. Rep. 884, it is held that a finding of insolvency would not be disturbed where two witnesses testified that they had demanded payment and the debtor replied that he could not pay, that he had tried to raise the *money* and was unable to do so; the court saying, that this testimony clearly showed insolvency, "not considering the nineteen attachments." And apparently not considering the amount of property owned by the debtor, but considering only the fact that he was unable to raise the *money*. Whether the nineteen attachments interfered with the raising of the money does not appear from the case as reported. These decisions and especially that in *Sarcey v. Lobree* with the cases therein cited and commented on, indicate *first*, that the court construes section 3450 of the Civil Code as giving the true definition of insolvency applicable to proceedings under the insolvency act, and *second*, that they are not harmonious in their construction of the law as to whether the debtor is able to meet his debts as they become due *in money*, and *third*, they throw the subject into confusion by the citations of decisions of the United States Supreme Court, which indicate a distinction between "traders" and other persons, and

apparently concluding that no precise rule can be applied to all classes of persons in determining their insolvency. The Civil Code does not warrant any distinction as to persons—whether traders or not. It is absolute and decisive in its language. The United States Courts did not have any such statutory definition to control them, and of course followed the old English distinctions.

It must be conceded that this legislation giving one definition for all persons is at fault, and the decision in *Sarcey v. Lobree* is not in this respect consonant with reason.

If the debtor's obligation is payable in money only, as is the case with the great majority of obligations, and he is unable to meet the obligation with his own means, when it becomes due, logically, the "means" required is *money*; hence the code is at fault in attempting to apply a single rule to all classes of obligations and all classes of persons. In any event it will not do to apply this definition for the purpose of determining when a person should be thrown into, or voluntarily go into insolvency proceedings.

This code definition, its construction by the court, and the attachment laws, all contribute to the distrust so manifest between debtor and creditor and between creditors themselves.

Where security is taken by a creditor in good faith who honestly gives assistance to his struggling debtor, though he may know his condition, if done in the usual and ordinary course of business, with the intention to assist his debtor, the transaction should not be deemed fraudulent, but he should retain his security. This would tend to foster confidence between the debtor and creditor, and often have the effect to tide the debtor over, and prevent the calamity of insolvency. Section 9 of the act, which deals with the causes upon which a petition by creditors may be filed, contains the provision that "nothing" in this section "shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith upon a security taken in good faith on the occasion of the making of such loan," but the provision is unfortunately in the wrong section to be available. Section 9 does not deal with fraudulent preferences and transfers, nor with grounds for withholding a discharge. Under this statute and the code provisions concerning attachments the debtor dare not expose to his creditor his condition with a view of asking assistance, and if he should, as already said, the creditor dare not assist him, for the reason that the transaction, would almost certainly be held to be void under proceedings instigated and pressed by other creditors.

The Torrey Bankruptcy bill pending in the last congress is reported as fostering the ideas here advanced, and as recognizing the policy of securing the creditor in any honest endeavor or advance made, to rescue an honestly failing debtor; and in fact provides for meeting of creditors and the laying before them the debtors circumstances at any time, and for settlements and compositions, and the prevention of attachments by removing all advantages to creditors who precipitate insolvency by attachments. Under the California law the attaching creditor is assured the repayment in full of his costs on attachment.

It is further submitted that the recent act of California is decidedly faulty in its provisions concerning settlements and dismissal of proceedings. This subject is alluded to in the note under section 70 of the Act, but it may be further stated that under the English law as well as under our national Act of 1867, composition and dismissal of proceedings are and have been facilitated. What good purpose can be subserved by compelling the expensive procedure of insolvency, when a reasonable adjustment can be arrived at between the debtor and a fair majority, in numbers and amount, of the creditors? Our state legislation seems particularly directed against any adjustment *after appointment of assignee*. I know of no precedent nor reason for this.

Section 70 virtually shuts the door to dismissal of the proceedings, or settlement between the debtor and his creditors. It provides that the court may dismiss, before the appointment of an assignee on petition of the debtor (voluntary proceedings) or the petitioning creditors (in involuntary proceedings) upon giving ten days notice, *if no creditor files written objections* to such dismissal. Written objections, then, by *any* creditor would prevent a settlement or dismissal before the appointment of an assignee. But by consent of *all the creditors* it may be dismissed "at any time," meaning, apparently before the appointment of an assignee, as the qualification in the last sentence is to the effect that after the appointment of an assignee no dismissal can be had without the consent of the debtor also,—*"the consent of all the parties interested in or affected thereby."* Without an order extending time for meeting of creditors, the ten days' notice in a voluntary proceeding is utterly impracticable unless the debtor decides to go into and out of insolvency on the same day. Besides, the petitioning creditors should have the right to dismiss, even against the objection of all other creditors at any time before the appointment of an assignee, for the reason that they are

liable on their bond, and if they discover that they have made a mistake, they should not be bound to go on because a creditor whose debt would amount to only one dollar should see fit to compel them by his objection, especially as he would be under no liability to the debtor for costs, damages and attorneys fees sustained by the debtor by reason of the petition. And after the appointment of an assignee a majority of the creditors (in involuntary proceedings) should have the right to dismiss—thereby enabling them to effect composition and settlement with the debtor. Composition should be encouraged, rather than obstructed, after adjudication or appointment of an assignee as well as before; and a certain per cent. of creditors, say three-fourths, should be empowered to compel consent of the other one-fourth to any composition agreed upon.

The decision of Judge Blatchford in *In re Reiman and Friedlander*, XI Bankruptcy Register Reports pages 21, *et. seq.*, is interesting and instructive upon the English and American Acts concerning settlements or compositions.

Again, some of the grounds upon which a debtor may be involuntarily thrown into insolvency, (as stated in section 9) are, to say the least, unreasonable in a business view, and in view of ordinary experience. *Three* days is not an unreasonable time for property to remain under attachment. There are many circumstances, where a debtor, might find it very inconvenient to procure his bonds and necessary papers in less than three days, by which to have his property released, perhaps from a disputed and unjust demand of an attaching creditor.

Perhaps he has applied for a loan, and there are delays in procuring a certificate of title, or may be there is a cloud, or some technical defect in the record title which has to be removed by suit to quiet. An attachment may be levied upon unoccupied land and the debtor may not know of the levy until more than three days afterwards. Five of his creditors, who have knowledge of the attachment may file their petition to have him adjudged insolvent. The only allegation in the petition necessary to base the adjudication upon is that the debtor, "being insolvent, has suffered his property to remain under attachment three days," and, the service of an order to show cause may be the first intimation the debtor has had of the attachment proceedings.

The U. S. Bankruptcy Act of 1867, contained no such provision as to attachment, but it did provide that it should be deemed an act of bankruptcy for a debtor to remained under arrest and in custody under or by virtue of mesne process or execution, etc., for

a sum exceeding one hundred dollars, if such process is remaining in force and not discharged by payment, or in some other manner provided for, etc., for a period of seven days; or if he has been actually imprisoned for more than seven days in a civil action founded on contract, for the sum of one hundred dollars or upward; but this period was in each instance extended to twenty days by amendment.

A small trader owes seven hundred dollars. He has over five hundred dollars worth of goods (cost price) in his store, and a hundred dollars in bills outstanding, all collectible within thirty or sixty days, with a horse and wagon for delivery, worth seventy-five dollars, a house worth one hundred on leased ground, counter, shelving, scales, etc., worth one hundred dollars provided his business can continue. Is he insolvent according to the decision in *Sarcey v. Lobree*? A creditor who is himself hard pressed, or who is from any cause dissatisfied, attaches for fifty dollars, and our trader is unable for three days to raise the attachment, and he has told the creditor and others that he has tried to raise the money but was unable. Is he for this reason any more insolvent than he was before the attachment was levied? If so is not his insolvency due to the attachment? No one would risk advancing him fifty dollars and take his horse and wagon or his house, or his goods as security. It is not improbable that attachment will cause a condition of insolvency which otherwise could not be established on creditor's petition.

The decision in *Sarcey v. Lobree* to the effect that it is not sufficient to show that the debtor did not have money on hand to pay his obligations, or any particular obligation when due cannot be relied upon to determine many cases which may arise under this clause of section 9. That decision was not unanimous, and the point directly in issue related to a fraudulent preference, although the insolvency proceedings were based upon the fact that Lobree had remained four days under attachment. If it were more clearly understood what was meant by "being insolvent," the provision in regard to attachment might appear more reasonable, but it is difficult to see the utility of this clause under any circumstances, for if the debtor is in fact insolvent, (and this condition must be understood to exist when the petition is filed, in order to sustain an adjudication) the creditors should be entitled to file their petition and to the adjudication, whether the debtor had been attached or not. The clause is a mischievous one rather than beneficial. If the code definition of insolvency be applicable, why should not involuntary proceedings be

authorized whenever that condition exists, and the insolvent fails for a limited period to petition for himself, independently of whether or how long he has been attached. If attachment is to form any element of the condition of insolvency, three days time is unreasonable as a criterion, and in any event, the debtor should "knowingly" suffer his property to remain under attachment during the prescribed period.

There are also provisions in section 9 of the present act which apparently justify involuntary proceedings without insolvency actually existing; as, "about to depart from the state with intent to defraud his creditors; or being absent from the state remains absent with such intent; or conceals himself to avoid the service of legal process," etc., and which provisions imply fraud or improper conduct upon the part of the debtor; but there are other distinct clauses. "Or has confessed or offered to allow judgment in favor of any creditors; or willfully suffered judgment to be taken against him by default." These clauses should have distinctly included "being insolvent," for it is not infrequent that a mortgagor, being willing that the security should be taken for the debt, permits a foreclosure without contest, and so may other honest debtors, not insolvent, have reason for permitting a suit to go to judgment without contest.

Another provision in the same section is equally subject to criticism, viz: "Or in contemplation of insolvency has made any payment, gift, grant, sale, conveyance or transfer of his estate, property, rights or credits." In view of the attachment laws, the code definition of insolvency, and these provisions of the Insolvency Act itself, it is remarkable, (if the statement be true,) that not more than two per cent. of our trades people become involved in insolvency proceedings. The statement may be sustained by the fact that a great many small traders give up everything upon attachment proceedings, or surrender to the board of trade, or otherwise effect a settlement without insolvency proceedings, or successfully elude both by surreptitiously disposing of and covering up portions of their effects, and thus avoid being counted as subjects of insolvency; for if this provision of the law were enforced according to the letter, and in every instance where insolvency is "contemplated" at the time of making sales and payments, the per cent. would be largely increased. If we add to the provision the condition, "with intent to prefer the creditor to whom the payment, sale or transfer is made," as contained in section 53 of the act, the criticism is still applicable, for no payment could be made by the merchant who knows he is failing,

and contemplates insolvency so far as to consult his attorney about it, and, at the same time has *means*, but not *money*, which, if the cramp were removed, would enable him to pay all his debts. He knows that by making the payment, though it be but a gas or water bill, he is preferring that creditor by paying him in full, and he cannot pay him without at the same time intending to pay and thus prefer him. Section 9 uses the language, "in contemplation of insolvency," section 59, "being insolvent or in contemplation of insolvency," and section 53, "in contemplation of becoming insolvent." The sections deal with different phases of the proceedings, but while we keep in view the only definition of insolvency afforded by the general law, this provision of section 9 would seem to authorize the filing of a petition against a debtor who paid any bill while he contemplated the fact that he was unable to pay his bills out of his own means as they became due; and although "means" properly includes more than "money," it must be conceded that "payment," in the commercial sense, implies liquidation *with money*. "Performance of an obligation for the delivery of money only is called payment." Section 1478, C. C. At least, this section would seem to make it an act of insolvency for any debtor, who thinks it probable that he will be obliged to file a petition, or that his creditors will file a petition against him, to make any payment to any creditor; and to be consistent throughout, this payment, sale, etc., must be construed to "clinch" the fact that the debtor is unable to meet his obligations with his own means as they become due! For if the debtor were indeed insolvent before he made the payment, why should he not be proceeded against whether he made the payment or not? Such provisions would be more appropriate as grounds for refusing a discharge, but it is believed that some of them would be too rigorous even in that connection.

Attempting to retain some of the older ideas of bankruptcy, section 9 further provides that involuntary proceedings may be had against a merchant or tradesman who has stopped or suspended and not resumed payment within a period of forty days after the maturity of any written acknowledgment of indebtedness, unless the right to proceed under this provision has been waived by the party holding such acknowledgment; and as to a bank, banker, agent, broker, factor, or commission merchant, if he has failed for forty days to pay moneys deposited with him or received in a fiduciary capacity, etc.

It does seem strange that those from whom money is most cer-

tainly expected, such as merchants and tradesmen, in meeting their obligations, and banks, bankers, agents, etc., who receive the money of their customers, and who act in fiduciary and confidential relations, have forty days extended to them, while other people who depend more upon barter, exchange or manual labor by remaining attached for three days, if not already insolvent, may become so while waiting upon the bank, banker, agent, factor, merchant or tradesman whose days of grace extend to forty.

In ordinary experience and common acceptation, the merchant, bank, agent and factor will be regarded as insolvent in a much shorter time than other persons for failure to meet an obligation.

If there were not a code definition of insolvency it would be proper to designate in the insolvency act certain conduct and conditions as authorizing petitions, voluntary and involuntary, to be filed; such conduct or conditions being deemed "acts of insolvency." It was in this manner the English and American Bankruptcy Acts were framed, and different conduct or conditions made applicable to persons of different classes of business as "acts of bankruptcy."

Amendment of petition in involuntary proceedings has been provided for by section 9, but amendment of a voluntary petition, if permissible, is so only under the general terms of amendment provided by the Code of Civil Procedure.

It is manifest that sufficient care has not been taken in preserving the distinction which existed in the English bankruptcy and insolvency laws, between traders or merchants and other persons. The definition given by section 3450 of the Civil Code is not readily adaptable to all classes of persons, and the numerous clauses in sections 9, 53 and 59 of the Insolvency Act have become a jumble, crowding one upon another for place, difficult to reconcile by the courts, and certainly perplexing to the practitioner. If they are not additions to the code definition of insolvency what is their utility? It was charged that the Bankruptcy Act of 1867, while crude in the beginning had, by amendments become burdensome to the people whom it was intended to benefit. The same may truthfully be said of the insolvency law of this state. The code provisions concerning Assignments for the Benefit of Creditors, contain an excellent framework for an insolvency law, requiring little alteration other than to insert provision for final discharge of the debtor, and another to the effect that when a person fails or is insolvent and he neglects for a specified time to file his petition in insolvency or make



a cession of his estate, creditors may file a petition and cause all of his estate, excepting exempt property, to be seized and ratably distributed. A definition of insolvency could also be framed which would apply to classes or occupations in accordance with common experience and reason, or, certain acts and conditions could be declared to constitute insolvency and authorize proceedings to be taken. The grosser frauds should be punished criminally, and others should cause forfeiture of the right to discharge.

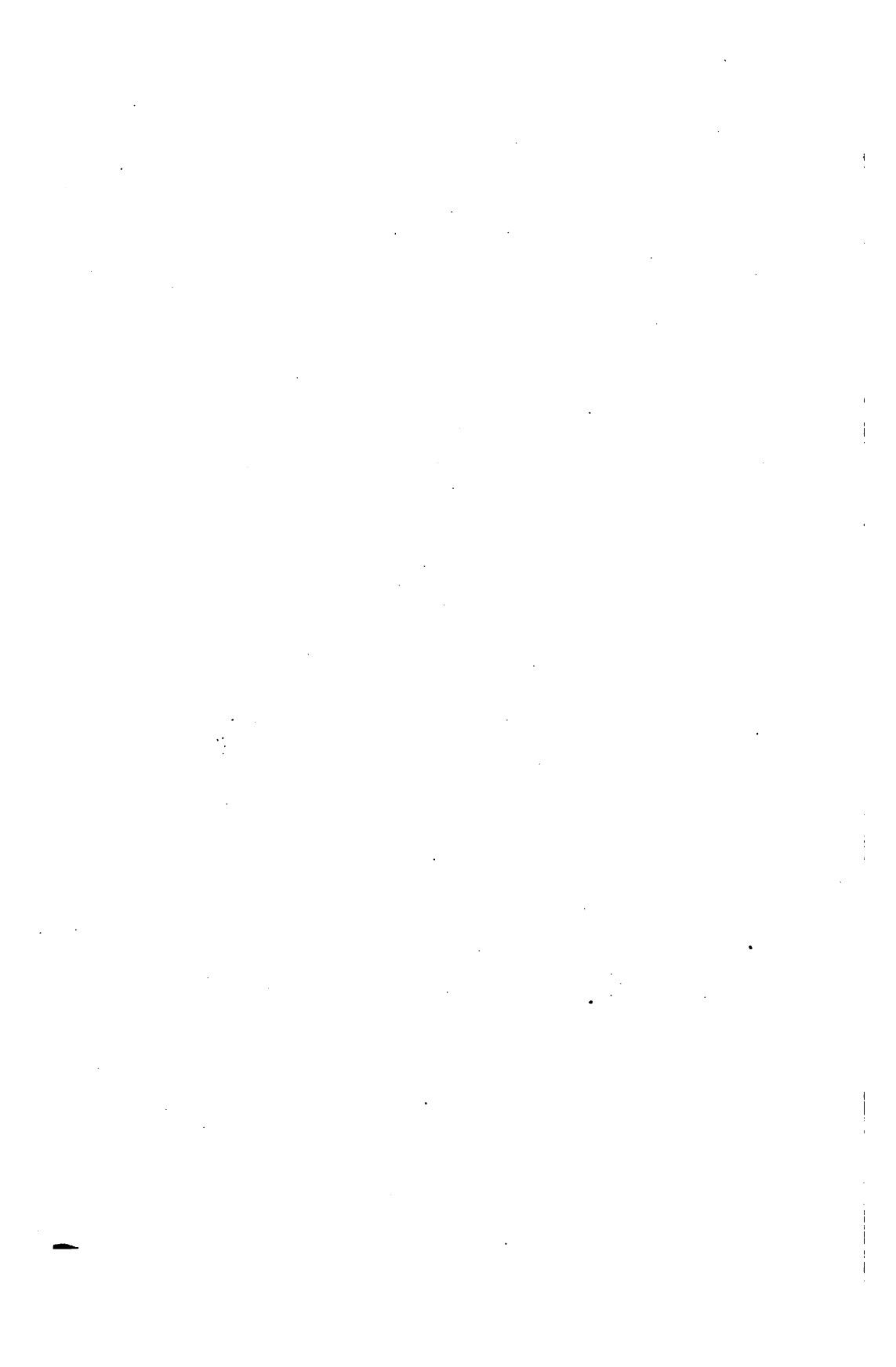
The provisions of our constitution and the numerous decisions relating to general and special laws and the uniform operation required of general laws, it is believed have not been well considered in the enactment of the Insolvency Act, especially with reference to the time given for appearance in answer to the order to show cause, the publication thereof, and on the subject of receivers, but sufficient has been suggested with reference to these matters in the notes under the respective sections of the act.

Again, the statutes of every state and territory of the union have been examined so far as available and not one of them furnishes a precedent for the extreme expedition of procedure provided for in this act for the initiative proceedings in insolvency. The Nebraska assignment law provides that the assignor shall within ten days file his inventory and statement of debts and credits, and within fifteen days thereafter the county judge shall have a meeting of creditors to choose an assignee to supercede the sheriff, and these dates although relating to a voluntary assignment for the benefit of creditors are shorter, by far, than those of any other statute for like proceedings or insolvency proceedings.

The publisher in a spirit of generosity and believing that he is contributing to the value of the work, has included in the appendix the Insolvency Acts of 1852 and 1880, also the principal part of the Bankruptcy Act of 1867.

W. F. H.

June 14, 1895.



# SYNOPSIS

—OF—

## *Assignment and Insolvency Laws*

—OF—

ARIZONA,  
MONTANA,  
OREGON,

COLORADO,  
NEVADA,  
OKLAHOMA,  
WASHINGTON AND WYOMING

IDAHO,  
NEW MEXICO,  
UTAH,

With Annotations.

### ASSIGNMENT LAW OF ARIZONA.

Insolvents and those contemplating insolvency may make assignments of all their estates for the benefit of all their creditors, in proportion to their respective claims. The assignment shall provide for the distribution of all of the debtor's estate except exempt property. Assignment must be accompanied by an inventory containing an account of all creditors and their places of residence, if known, and if not known, that must be stated; the amount owing to each, the nature of the debt or demand, the true cause and consideration in each case, and the place where the indebtedness arose; also a statement of any security for such indebtedness; a full and true inventory of the debtor's estate with incumbrances, etc. The inventory must be sworn to, and the assignment must be proved, acknowledged and recorded in the same manner as conveyances of real estate.

A debtor may make an assignment in favor of only such creditors as will consent to receive a proportional share of his estate and discharge him from their claims, and the benefit of such assignment is then limited to those creditors who consent.

The assignee must give a bond to be approved by the district judge.

Consenting creditors must make known their assent to the assignee within four months after notice, the notice to be served personally or by mail or by three weeks publication, and claims must state the particular nature of the demand and be duly verified by affidavit of the creditor, his agent or attorney and filed with the assignee within six months. The claim must show the true indebtedness over and above offsets or credits, and no creditor is entitled to benefits who neglects such statement and affidavit.

A non-consenting creditor may serve garnishment upon the assignee for any excess remaining in his hands after payment of the consenting creditors, and costs and expenses of the assignment.

But every mortgage or deed of trust or other form of lien attempted to be given by the owner of any stock of goods, wares or merchandise, daily exposed to sale in parcels in the regular course of business of such merchandise, and contemplating a continuance of possession of such goods and control of said business by sale of said goods by the owner thereof, shall be fraudulent and void.

Any attempted preference of one or more creditors is void.

The assignee for the benefit of creditors who has received personal property of the estate may sue in his personal capacity to recover it when it has been wrongfully taken from his possession. *Cullum v. Paul*, 8 Pac. Rep. 187. (Ariz.)

In a general assignment for the benefit of creditors the law presumes the assent of the creditors where there are no preferences or restrictions, and in the absence of proof of dissent. *Id.*

An assignment for the benefit of creditors is not rendered void because the assignor remains in possession of real estate assigned, and a delay of one year in disposing of property assigned is not unreasonable under the circumstances. *Rochester v. Sullivan*, 11 Pac. Rep. 58. (Ariz.)

Where partners had made general assignments of their individual estates to secure, first, individual creditors and then for the benefit of creditors of the firm, and had also assigned the partnership assets, *Held*, that to a bill seeking to subject a certain fund belonging to the individual estate of one of the assignors in the assignee's hands to the payment of a judgment against a corporation of which he had been a stockholder, neither of the partners were necessary parties to such suit as they had parted with all their interest in the estates. *Samaniego v. Stiles*, 20 Pac. Rep. 607. (Ariz.)

An assignment made by a debtor for the benefit of some of his creditors to the exclusion of others is valid, and is subject to be defeated only by appropriate proceedings under the U. S. Bankruptcy Act, within six months after such assignment. *Ford v. Hayes*, 1 Ariz. 229.

## ASSIGNMENT LAW OF COLORADO.

Any person, corporation or partnership may make a general assignment of all his, her or its estate for the benefit of creditors. The deed of assignment must show that it is intended for the benefit of all creditors without preference, and it must be acknowledged and filed for record in the recorder's office of the county of the debtor's residence, or if a non-resident, in the county of the principal place of business.

Valid claims of laborers, servants and employees of the assignor for wages earned during the preceding six months, but not exceeding fifty dollars to any one person, are made preferred claims provided they are claimed by the person who earned the same, and claims of creditors filed during the first three months are preferred over those filed later.

The assignee's bond is approved by the clerk of the District Court in the county where the assignment is made. All proceedings under the assignment are under the supervision of the District Court of the county, and the assignee is subject to its orders, but this supervision may be avoided by agreement in writing between the assignee and the creditors.

A petition in insolvency must show the dates of the incurring of debts, as those existing prior to the passage of the Insolvency Act are held not affected by it. *Goodell v. Creditors*, 1 Colo. 215.

An inventory and list of creditors without oath of the assignor thereto is insufficient under 1 Mills' Ann. St., Sec. 170. *Palmer v. McCarthy*, 2 Colo. App. 422; 31 Pac. Rep. 241.

Creditors who do not accept or become invested with assets under the assignment may pursue their remedies by attachment and execution. *Elliott v. Hobbs*, 2 Colo. App. 169; 30 Pac. Rep. 54.

Under section 186 Mills' Ann. St. Colorado, it is provided in substance that no assignment for the benefit of creditors shall be invalid by reason of prior transfers, but that the assignee may recover property previously misappropriated or fraudulently disposed of. *Hunter v. Ferguson*, 3 Colo. App. 287; 33 Pac. Rep. 82.

The statute provides that any person may make a general assignment of all of his property for the benefit of his creditors, but it must be a full and complete *bona fide* conveyance of all his property for the benefit of all his creditors. In order to vitiate the assignment it must be lacking in one of these requirements. A man may make a valid assignment although his assets greatly exceed his liabilities, and may lawfully do so expecting that a surplus will remain. *Hunter v. Ferguson*, 3 Colo. App. 287; 33 Pac. Rep. 82.

A condition in a deed of assignment for the benefit of creditors, requiring creditors to release the assignor from all claims before sharing in benefits under the deed, the surplus to be returned by

the assignee to the assignor, is void. *Duggan v. Bliss*, 5 Colo. 223.

[This decision is not based on any provision of the statutes of Colorado, but is arrived at after referring to cases both in England and several states of our Union.]

An attorney at law may act as assignee of an insolvent firm. *Tucker v. Parks*, 7 Colo. 66, 298; 1 Pac. Rep. 427; s. c. 3 *id.* 486.

In an action by the assignee for goods sold to the defendant after the assignment, the defendant cannot plead an indebtedness of the assignor as a set off. *James v. McPhee*, 9 Colo. 486; 13 Pac. Rep. 535.

There being no state statute relating to assignments for the benefit of creditors directly controlling the question, *Held*, an attachment duly levied upon personal property of debtors who had several hours previously executed a general assignment for the benefit of creditors, is controlled by the statute relating to transfers of personal property and requiring an immediate and continued change of possession. No delivery or change of possession of the property having been made under the assignment, the attachment seizure will prevail over the rights of the assignee. *Ray v. Raynolds*, 8 Colo. 467; 9 Pac. Rep. 16.

According to authorities, an assignment for the benefit of creditors, may be held good in part and void in part. Such assignment is as good in equity as law to pass the legal title to the assignee. *Salisbury v. Ellison*, 8 Colo. 157; 6 Pac. Rep. 217.

A surviving partner may make an assignment for the benefit of creditors. *Salisbury v. Ellison*, *Id.*

Voluntary assignments for the benefit of creditors valid in the state where the debtor resides, affect generally the debtor's personal property though situate in another state.

The word "Estate" in the general statutes (Sec. 68) means all of the debtor's property, real and personal, not exempt from execution, and that statute was intended to embrace general assignments, but that section should not be construed as prohibiting or interfering with the making of partial assignments.

The fact that an insolvent debtor clearly attempts to evade the statute by preferring certain creditors in separate transfers conveying portions of his property at or about the time he makes a general assignment, may be a reason for avoiding the preferences, but not for declaring the assignment itself void.

The fact that one of the creditor beneficiaries is a firm of which one of the assigning debtors is a member will not defeat the assignment. *Campbell v. Colo. C. & I. Co.*, 9 Colo. 60; 10 Pac. Rep. 248.

In an action by the assignee for the benefit of creditors the *bona fides* of the assignment cannot be set up in the answer unless the defendant further alleges himself to be a creditor or in some way connects himself with an interest in the estate assigned. The *bona fides* of the assignment is not pertinent to the defendant's indebtedness. *James v. McPhee*, 9 Colo. 486; 13 Pac. Rep. 535.

Funds of an insolvent bank on deposit in banks in New York, paid to the assignee for the benefit of creditors in Colorado, before presentation of drafts drawn against said deposits by the insolvent bank prior to its assignment, cannot be recovered from the assignee by the payee of the draft. The funds having been recovered by the assignee before presentation of the draft should be held for the benefit of all the creditors. That said funds were not specifically mentioned in the deed of assignment does not render the assignment invalid. *Ray v. Hiller*, 11 Colo. 445; 18 Pac. Rep. 622.

In the absence of any statutory requirement of a "schedule," an assignment by the debtor of "all the estate" of the assignor, "of every description," "a schedule of which property" the assignor promises to make out and annex to the deed, is sufficient as to description, and is not invalidated by the failure of the assignor to make and attach a schedule. *Raynolds v. Ray*, 12 Colo. 108; 20 Pac. Rep. 4.

An assignment "for the use and benefit of the creditors," and accompanied by a schedule of creditors, from which some creditors are entirely omitted, is void.

Where such assignment is of "one lot of boots and shoes consisting of a miscellaneous lot usually kept in a shoe store and of the value of about \$7000," without designating the location of the goods, is void for want of sufficient description. Rehearing denied. *Burchinell v. Masconi*, 36 Pac. Rep. 307. (Colo.)

The statute of Colorado, (Mills' Ann. Secs. 169, 171) permits an assignment for the benefit of all creditors but provides that in case of insolvent debtor, or in contemplation of insolvency, such deed shall be void unless it provides for distribution among all creditors *pro rata*. *Held*, where an insolvent is sued by a creditor, an answer admitting the debt, and suffering judgment to be taken and levy to be made on practically all the goods of the debtor, does not constitute an assignment nor attempt at assignment under the statute, and does not entitle other creditors to come in and share with the execution creditor. *Kellogg v. Thropp*, 36 Pac. Rep. 447. (Colo.)

A creditor having, after a general assignment for benefit of

creditors, levied upon and sold property included in the assignment, in part satisfaction of his judgment, cannot afterwards demand of the assignee any share in the proceeds of property which came into his hands under the assignment. The prosecution of such attachment proceedings, execution and sale is a waiver of right to share in the remainder of the estate, under laws 1885, page 45. Under same laws, an assignee may except to a claim presented to him although he is not himself a creditor, and a statement by him in a report filed by him to the effect that a creditor has waived his right to share in distribution of the estate by reason of prosecuting attachment proceedings, is an exception to the claim of such creditor. *Beifield v. Martin*, 37 Pac. Rep. 32. (Colo.)

It is the general rule that a debtor, whether solvent or insolvent, has a legal right to dispose of his property by way of sale or incumbrance, for the purpose of paying or securing any legitimate debt, without bringing himself, necessarily, within the act relating to general assignment for the benefit of creditors. And no instrument of transfer or incumbrance will be adjudged to be a deed of "assignment" unless its terms necessarily compel that construction, or unless there be something in the transaction on which the court would have the right to conclude that the parties intended to make such disposition of their property. Such intention is derivable either from the language of the instrument or the acts of the parties. Accordingly it is held that where a firm knowing themselves insolvent and hard pressed by creditors, executed demand notes to certain of their creditors and secured the same by chattel mortgages upon all their goods and effects, the mortgagees taking possession, the transaction was not a general assignment for the benefit of all creditors, and the title of the mortgagees was sustained as against subsequent attaching creditors. *McCord-Bragdon G. Co. v. Garrison*, 37 Pac. Rep. 31. (Colo.)



## ASSIGNMENT LAW OF IDAHO.

A debtor, by petition to the district judge of his district, may cause a cession of his property for the benefit of creditors. The petition must set out the circumstances which necessitate the assignment, and must be accompanied by full and complete schedules of assets and liabilities, under oath, the form of which is prescribed by the statute. The judge orders notice to creditors, to be published from thirty to forty days, to show cause why the assignment should not be made, and to select an assignee. If the creditors neglect to select, the sheriff becomes the assignee. Any creditor by allegations in writing, may attack the assignment for fraud within ten days after the appointment of the assignee. If the debtor answers the attack, the issues are tried by a jury. Non-resident creditors may be represented by an attorney appointed by the court, and his fee can in no case exceed three hundred and fifty dollars. No preferences are allowed.

An assignment by a non-resident of Idaho, made in conformity with the law of his domicile and providing for preferences, is invalid under Rev. Stat. Idaho, Secs. 5875, 5932, as against attaching creditors of property in the latter state, and it is immaterial that the attaching creditor is also a non-resident. *Barnett v. Kinney*, 2 Idaho 706; 23 Pac. Rep. 922, 24 *id.* 624.

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## THE LAW OF MONTANA.

In Montana, at least up to October, 1894, there had been no legislation specially referring to assignments for benefit of creditors, or insolvency. Common law assignments are recognized.

Where it does not appear that both partners of a firm consented to an assignment for the benefit of creditors, nor that one had authority to act alone in such matter by reason of agreement or because of the absence of the other and a necessity for acting alone, the assignment by one of the partners will be held void as against attaching creditors—the attachments being given priority in the order in which they are levied. A complaint based on the assignment must affirmatively show the authority of one partner for executing the same, or it will be held bad on general demurrer. *Steinhart v. Fyhrie*, 5 Mont. 463; 6 Pac. Rep. 367.

When a creditor who is preferred, consents to an assignment for the benefit of creditors, he cannot afterwards attach the property of his debtor the better to secure his debt. *Elling v. Kirkpatrick*, 6 Mont. 119; 9 Pac. Rep. 900.

Under the statute of Montana (Comp. St. 1887, Sec. 2050), it was provided that in cases of assignments because of inability to pay debts, and in insolvency cases, the claims of miners, servants, clerks, etc., to the extent of \$200 earned in the preceding sixty

days shall be preferred. A mortgage given to one creditor, to secure him, with immediate possession and power to sell and apply proceeds to the debt and pay overplus to mortgagor, is construed as an assignment entitling a clerk of mortgagor to be paid as a preferred creditor. *Marshall v. Livingston Nat. Bank*, 11 Mont. 351; 28 Pac. Rep. 312; *Flanders v. Murphy*, 10 Mont. 398; 25 Pac. Rep. 1052.

It is not correct to find that because a person has not money or property with which to buy into or start business, he was insolvent. Such facts are not equivalent to a person being indebted and unable to pay his debts. *Teitig v. Boseman*, 12 Mont. 404; 31 Pac. Rep. 371.

In an action to set aside an assignment for the benefit of creditors on the ground of fraud of the assignor, the assignee being a party to the action and in possession of the assigned property, the complaint is not demurrable in not alleging that the assignee was cognizant of, or party to the fraud of the assignor. *Stevenson v. Matteson*, 13 Mont. 108; 32 Pac. Rep. 291.

A grant may be valid though an exception therein may be void for want of certainty, as where the deed of assignment is of all and singular the lands, etc., of the grantors or either of them, the title will pass to the assignee. The exception—"except what are exempt by the laws of Montana territory" construed, and held that it is better to require the assignor to point out to the assignee and claim what is exempt by law, than to declare the assignment or exemption void. *McColloch v. Price*, 36 Pac. Rep. 194 (Mont.)

A complaint that a certain creditor of the assignor's offered to remit interest on its account, if the assignee would deposit collections with it, does not authorize an order for the assignee to make such deposits, where it is not shown that he is not doing so. *Kleinschmidt v. Steele*, 38 Pac. Rep. 827 (Mont.)

Where a creditor asks the enforcement of an assignment in all particulars except as to preferences, he cannot claim that it is fraudulent as to creditors. *Id.*

A complaint which alleges that plaintiff believes the assignee has not made an inventory does not entitle him to a decree requiring the assignee to make such inventory. *Id.*

An assignee will not be required to give bonds, where there is no showing of financial responsibility. *Id.*

Where the assignment refers to "Schedule A," and the only schedule mark is "Schedule B," the variance is immaterial. *Id.*

The payment by a husband of a debt due by him to his wife

is not *per se* fraudulent as against his creditors. *Lambrecht v. Patten*, 38 Pac. Rep. 1063 (Mont.)

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### INSOLVENCY LAW OF NEVADA.

An insolvent debtor whose debts and liabilities exceed five hundred dollars may petition the District Court in the county in which he has resided one year immediately preceding, to be discharged from all his debts, etc. A schedule and inventory must accompany the petition showing all his property, real and personal, choses in action, etc., and all liabilities, incumbrances, etc., and an estimate as near as possible of the cash value of the property surrendered. The schedules must be subscribed and sworn to by the debtor before the judge. An order staying proceedings, directing creditors to show cause why a discharge should not be granted, and calling a meeting of creditors for selection of an assignee is required. The order must be published for thirty days before the time fixed for meeting of creditors, and be served by mail.

By amendment of February 18, 1885, all legal mortgages and liens *bona fide* on the property of the debtor at the time of the surrender shall remain good and valid, and may be enforced—due notice being given to the assignee—as though no such surrender had been made. Creditors must swear to the correctness and justness of their claims; the majority in amount of claims select the assignee, or upon failure so to do, the court appoints the sheriff of the county. Bond is required of the assignee. The assignee, when appointed, is vested with all the estate of the debtor except such as is set aside by instrument under seal of the court for the use of the debtor.

Involuntary proceedings are also permitted on petition of five or more creditors whose claims aggregate not less than five hundred dollars. This portion of the statute is almost identical with Secs. 9 and 10 of the California Act of 1895, excepting that there is no provision for amending the creditors petition, and there is nothing said with reference to an order forbidding the payment of debts and the delivery of property to the debtor, or the transfer of property by him.

The Nevada statute is also made applicable to partnerships and corporations. No discharge can be granted to a corporation.

In case a debtor who applies for the benefit of the act should already have received the benefit thereof, he cannot be discharged unless the property surrendered by him amounts to fifty per cent. of his liabilities, or unless three-fourths of his creditors in numbers and amount, consent thereto.

The mere fact of the insolvency of a purchaser of goods, though well known to himself, if no artifice or false representations are made, is not sufficient to avoid the sale to him. *Kloppenstien v. Mulcahy*, 4 Nev. 295.

Where a mining stock broker failed, and assigned all his property for benefit of creditors, and one of the creditors for whom he had purchased certain stocks refused to accept under the assign-

ment and demanded of the assignees stock held by them, and brought an action of trover to recover the same—*Held*, it was not a sufficient defense that the assignees did not have sufficient of such stock to fill all the broker's contracts therefor. *Boylan v. Huguet*, 10 Nev. 345.

The Insolvency Act of Nevada (Sec. 36) contained the provision that "all legal mortgages and liens *bona fide* existing on such property at the time of the surrender aforesaid, shall remain good and valid, and may be enforced in the same manner as though no such surrender had been made," and it was held that the lien of a valid attachment existing at the time of insolvency proceedings was not divested by the order staying proceedings, and may be enforced by judgment and execution. But it appears that the judgment had been entered and execution was issued thereon prior to the order staying proceedings. *Berryman v. Stern* 14 Nev. 415.

A common law assignment for benefit of creditors is valid, and assignment for the benefit of all creditors who will come in and give a release to the assignor, although the insolvency law of the state contained the clause that "no assignment of any insolvent debtor, otherwise than as provided in this act, shall be legal or binding upon creditors." The assignment in question was not accompanied by any inventory and was not made in conformity with the Insolvency Act. But the National Bankruptcy Act was in force at the time of the assignment, and no proceedings in bankruptcy had been instituted by or against the debtor within six months after the assignment. The rule is also relied upon, that the assent of those representing claims equal to the value of the property assigned is a valid consideration and gives legal effect to the assignment, and if their debts amount to less, they constitute a good consideration *pro tanto* and give the assignee a right to hold the property. Creditors representing sixty thousand dollars of debts consented, and the record did not show the value of the property, but the assets were sufficient to pay the assenting creditors in full. *Sadler v. Immel* 15, Nev. 265.

Case of conveyance to trustee agreed upon by insolvent debtor and his creditors. *Luigi v. Luchesi*, 12 Nev. 306.

The order of the insolvent court staying proceedings against the insolvent is designed to protect the estate for the creditors. Where such order has been made by the District Court of one county, the District Court of another county still had jurisdiction to hear an appeal taken to it from a judgment of a justice's court against the debtor, and was not

bound to take judicial notice of the insolvency proceedings in another county. Section 15 of the Act of 1881 provides that suits pending in another county shall be transferred to the court in which the insolvency proceedings are pending. The action of the court in dismissing the appeal, etc., will not be reviewed on *certiorari*. The District Court of one county is not bound to take judicial notice of an adjudication in insolvency by a District Court of another county, and a disregard of such adjudication and stay of proceedings, if properly proven, would at most, only amount to error. Distinguishing *Taffs v. Manlove*, 14 Cal. 47; *Cerf v. Oaks*, 59 *id.* 132, and citing *Bandy v. Ransome*, 54 *id.* 88; *People v. Whitney*, 47 *id.* 584; *Pierson v. McCahill*, 23 *id.* 249. *Id.*

Where a non-resident member of a partnership appears by attorney in answer to an order to show cause why he should not be adjudged insolvent, the court acquires jurisdiction over his person and property. *Frankel v. His Creditors*, 20 Nev. 49; 14 Pac. Rep. 775.

Section 33 of the Nevada Insolvency Act provides that "no person can apply for or receive the benefits of this act through an agent or attorney in fact." Section 43 provides for practice on the return of an order to show cause similar to that in ordinary civil actions. Where the respondent makes his appearance on the order to show cause, the subsequent proceedings may be conducted by an attorney at law. *Id.*

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## INSOLVENCY LAW OF NEW MEXICO.

Is entitled "An Act to prevent debtors in contemplation of insolvency from preferring one or more creditors to the exclusion in whole or in part of others." The first section of the act is as follows:

"SECTION 1. Every sale, mortgage, or assignment made by debtors, and every judgment suffered by any defendant, or any act or device done or resorted to by a debtor in contemplation of insolvency and with the design to prefer one or more creditors to the exclusion in whole or in part of others, shall operate as an assignment and transfer of all the property and effects of such debtor and shall inure to the benefit of all his creditors (except as hereinafter provided) in proportion to the amount of their respective demands, including those which are future and contingent, but nothing in this act shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be lodged for record forthwith in the office of the county recorder where the property described therein shall be situated."

The transfers referred to are subject to the control of courts of equity upon the bill of any person interested, filed within six months after the

mortgage or transfer is filed for record. Any number of persons interested may unite in the bill, and no one need be made defendant except the debtor and transferee. The bill shall state the amount of debts of the debtor as far as known, to the complainants, and the court shall make an order directing all creditors not joining in the bill to appear before a master on a day named to prove their claims. Notice is given by publication, and in such other modes as are best calculated to give actual notice. Creditors presenting their claims become parties to the proceedings and are concluded thereby.

The court may compel the surrender of the property in his possession or under his control to a receiver, and may make such other orders as courts of law may make with reference to attached property. When it is decided that the debtor has violated section 1 of the Act, the court may compel him to surrender all of his property to the receiver, except such as is exempt from execution, and to disclose the amount of his debts, names and residences of his creditors, all offsets and defences to any claims against him, or other matters deemed proper; and after suit by the receiver, may compel others to make disclosures and surrender property of the debtor, and cause distribution of assets, disallowing improper claims, and by final judgment settling the same. Appeals are allowed from such decisions. Writs of *ne exeat* or attachments for contempt may be granted against the debtor. Claims of creditors must be sworn to.

Voluntary assignments may be made but do not become operative until the assignee takes possession and gives bond in double the value of the property assigned. Such assignee shall settle up the estate within twelve months, and failure to do so entitles any creditor to an action to compel settlement and distribution, and thereupon the matter shall be conducted as provided for in the first part of the act in involuntary proceedings.

The assent of creditors is not required to an assignment for benefit of creditors, and it is valid where no fraud is shown. It is not invalidated by failure to attach thereto a schedule of assets and liabilities, and of preferred creditors—it is sufficient if such schedules and lists are in the hands of the assignee. A general or partial assignment for benefit of creditors containing preferences, where no liens have attached is valid, unless prohibited by statute, or unless there is a bankruptcy law in force. (Watts J. dissenting.) *Leitensdorfer v. Webb*, 1 New Mex. 34. Invalid under Mexican law. *Id.*

In New Mexico, when there was no statute regulating assignments for benefit of creditors, it is made ground for attachment that the debtor has fraudulently concealed or disposed of property to defraud, hinder or delay creditors, and *Held*, an assignment for benefit of creditors was not void on its face because it authorized the assignee to sell for cash or credit "as he may think best." *Meyer & Sons Co. v. Black*, 4 New Mex. 190; 16 Pac. Rep. 620.

If the assignee finds his first valuation of the estate was too high, he may be allowed to amend it, and have his bond fixed

with reference to such amendment. *Lyndonville Nat. Bank v. Folsom*, 38 Pac. Rep. 253. (N. M.)

Title to corporate stock does not pass by a general assignment, as against creditors of the assignor, without a transfer on the books of the corporation. *Id.*

An attachment levied after a deed of assignment was executed, and before the assignee's bond was filed and approved, should be quashed. *Schofield v. Folsom*, 38 Pac. Rep. 251. (N. M.)

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### ASSIGNMENT LAW OF OREGON.

No assignment for benefit of creditors is permitted except it be without preference and in favor of all creditors *pro rata*. The assignment discharges all attachments in actions in which judgment has not been entered at the date of the assignment, but after paying costs of attachments and attorney fees, where allowed, such claims shall be deemed "presented" and shall share *pro rata* with others.

In case of assignments for benefit of all creditors, the consent of creditors shall be presumed.

An inventory of all the debtor's estate shall accompany the assignment and the assignment shall be sworn to and acknowledged and recorded as conveyances of real estate. "

Within thirty days after assignment any two creditors may petition the court to order the clerk to call a meeting of creditors to elect an assignee in place of the one named in the assignment. The clerk shall thereupon call such meeting to be held at his office not more than fifteen days from date of the call. The assignee elected by creditors must be a resident of the same county as the assignor. A majority in number and amount of claims of creditors, elect the assignee. If no one receives a majority of at least one-half in amount of all claims represented at the meeting, the matter is certified by the clerk to the judge, who shall select an assignee. The assignee named in the assignment conveys all the estate to the assignee selected; the new assignee gives bond and possesses all the powers of the one named in the assignment. Only perishable property may be disposed of pending the foregoing proceedings. The claims of creditors must be verified and filed with the clerk. The assignee makes and files an inventory and valuation of the estate under oath and shall then enter in to bond to the state for double the valuation of the estate. He shall publish notice of the assignment for six weeks and forward notice to each creditor, who must in three months thereafter forward to him a full statement of their claim, otherwise the payment of such claim will be deferred until those so presented have been fully paid.

A creditor may present claims to become due as well as those already due, reasonable abatement being made on the latter when not bearing interest.

On final settlement, if it appears that the debtor has been guilty of no fraud, concealment, etc., and his estate shall have realized at least fifty per cent. of all his debts over and above all expenses, the court may make an

order discharging him from debts existing at the time of assignment. Receiving dividends of less than fifty per cent. does not discharge the debtor from the remainder of the debt.

An assignment for benefit of creditors may be made directing the property to be sold and the proceeds paid to unsecured creditors. In an attack upon such assignment for fraud, the *onus* is on the person attacking to show fraud both on part of assignor and his assignee. *Krause v. Prindle*, 8 Ore. 158.

An assignment for the benefit of creditors under the Act of October 18, 1878, dissolves an attachment, and the property belongs to the assignee and cannot be sold in the attachment suit on execution issued on a judgment entered subsequently to the assignment. *McKinney v. Baker*, 9 Ore. 74.

That assignment discharges attachment lien. *Tichenor v. Coggins*, 8 Ore. 270.

The assignee for benefit of creditors under Act of October 18, 1878, does not occupy the position of a purchaser, but is a trustee under the assignment, and so far represents all the creditors that it is his duty to oppose an invalid claim of lien of any one of the creditors. *Jacobs Bros. v. McCally & Andrews*, 9 Ore. 52.

It was held that it was unnecessary to record a deed of assignment for benefit of creditors where possession of the property is delivered to the assignee. That the assignee will hold the property as against the sheriff with writ of attachment, though the deed is not recorded nor the inventory filed. (The Act of 1878 required recording and filing of inventory.) *Dawson v. Crossen* 10 Ore. 41.

An assignee for the benefit of creditors takes only such rights of property as his assignor had therein. Where the assignor had already, by parol, transferred goods to arrive as security for existing indebtedness and for advances subsequently to be made, the pledgee is, and the assignee for credits is not, entitled to receive the goods. *Gammons v. Holman*, 11 Ore. 284,

An appeal will not lie from an order of the Circuit Court refusing to remove an assignee under the Insolvent Act of 1878. *In re Goldsmith*, 12 Ore. 414; 7 Pac. Rep. 97; rehearing denied, 9 *id.* 565.

An assignor for the benefit of creditors will not be permitted to retain from his assignee a watch worth from \$50 to \$70, in the absence of a showing by him whether he retained other property, and if so, to what amount. *McClung v. Stewart*, 12 Ore. 431; 8 Pac. Rep. 447.

An assignee under a general assignment for the benefit of cred-



itors, takes the property subject to the rights of a prior mortgage and if the assignee converts the same, it is not necessary for the mortgagee in an action for conversion to allege or prove the amount due on the secured notes, the destruction of the security, or that the mortgagor is insolvent and unable to pay the debt. *J. I. Case Threshing M. Co. v. Campbell*, 14 Ore. 460; 13 Pac. Rep. 324.

No special mode being pointed out for review by Supreme Court of orders or judgments of the Circuit Court in insolvency, and jurisdiction to review being given, *Held*, under section 940, Oregon Code, and rule 14, Supreme Court, such review shall be by appeal. *Mitchell v. Powers*, 16 Ore. 487; 19 Pac. Rep. 647; same case on further hearing, 17 Ore. 491; 21 Pac. Rep. 451.

In presenting a claim to the assignee, something more is required than the mere demanding a certain sum of money. A statement under oath of the debt or liability should be made out and delivered to the assignee, and it should specify sufficient facts to apprise parties interested in the estate of the nature of, and consideration for the debt. To specify the debt as a promissory note, simply, is insufficient, as a note is, at best, only evidence of a debt. *Mitchell v. Powers*, *supra*, 17 Ore. 491; see *In re Russell*, 70 Cal. 132; *Campbell v. Judd*, 8 Pac. Rep. 804; same case, 7 West Coast Rep. 372.

One who has assigned land subject to a mortgage, has no such interest in it thereafter as will give force to a contract with the mortgagee to the effect that the latter will hold it as security for his own demand and to pay other debts of the mortgagor. *Monteith v. Hogg*, 17 Ore. 270; 20 Pac. Rep. 327.

An assignment for the benefit of creditors which provides for the payment of certain creditors but omits to include a certain creditor who had attached, is void under Sec. 3173, Oregon Code. *Stout v. Watson*, 19 Ore. 251; 24 Pac. Rep. 230.

The property assigned for the benefit of creditors is taken by the assignee subject to all existing valid liens and charges against it in the hands of the assignor. *Helms v. Gilroy*, 20 Ore. 517; 26 Pac. Rep. 851.

A deed of general assignment is valid where a third person, after it was signed and sealed but in pursuance of parol authority, filled in the name of the assignee and delivered the deed to him. *Cribben v. Deal*, 21 Ore. 211; 27 Pac. Rep. 1046.

A creditor is entitled to his dividends under an assignment for the benefit of creditors although his claim is secured by collat.

terals. (Hill's Code Sec. 3180.) *Kellogg v. Miller*, 22 Ore. 406; 30 Pac. Rep. 229.

The purpose of the law authorizing assignment by insolvent debtors is to provide for the equal distribution of the debtor's estate among his creditors, and not to protect him from payment of his debts, or to interfere with or suspend the right of a creditor to prosecute his claim to a personal judgment. (Act 1878. 2 Hill's Ann. Laws C. 28.) The Act of 1885, however, provides for a discharge of the debtor when his estate is made to realize fifty per cent. of his indebtedness over and above expenses of the assignment. *Thompson v. Reeves*, 37 Pac. Rep. 46. (Ore.)

An assignment of all and singular the property, estate, and effects, real and personal, of the assignor, and referring to inventory attached, conveys title to all his property, though part is omitted from the inventory. *Sabin v. Lebenbaum*, 38 Pac. Rep. 434. (Ore.)

An assignment is not void for failure of the assignee to qualify. *Id.*

An assignment is not void, though some of the property is omitted therefrom because the assignor thought it of little value. *Id.*

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## THE ASSIGNMENT LAW OF OKLAHOMA TERRITORY.

The provisions of this statute are almost identical with those of Secs. 3439, 3473 of California Civil Code prior to amendments of 1889.

Preferences are not allowed, and the assignment is void if it tends to coerce any creditor to release or compromise his demand. The assignment must be in writing, acknowledged and recorded as deeds. A full and complete inventory is required to be verified and filed within twenty days, and must show all the creditors, their place of residence, the nature of the debt or liability, and the true consideration thereof, as also the place where it arose; every existing judgment, mortgage or other security; all property of the debtor, exempt and otherwise, and all vouchers and securities relating thereto and the value of all property. The assignment is void if not recorded or the inventory is not filed, or if it provides for the payment of any unjust claim or contains reservation of any interest in the debtor or confers any improper power upon the assignee. The assignee must file bond within thirty days, and has no authority until all said provisions are complied with. There is no provision for any release of the debtor.

## THE LAW OF UTAH.

Utah has no statutory provisions regulating assignments for benefit of creditors, nor insolvency.

Comp. Laws, Sec. 2838, prohibits and renders void transfers made to hinder, delay or defraud creditors.

Under decisions of courts it is held that the wages of certain employees are entitled to preference in cases of assignments or deeds of trust.

In general, common law assignments with preferences are sustained.

It is conceded that an assignment authorizing the assignee to sell on credit, or to exchange goods for other property would be void, but such construction will not be placed upon the instrument where such intention is not expressly stated, and where a reasonable construction of the instrument does not point to such intention. *Sprecht v. Parsons*, 7 Utah 107; 25 Pac. Rep. 730.

The claims of the operatives of a street railroad for work performed within sixty days next preceding the appointment of a receiver are entitled to priority over a trust deed on the corporation's property, and such claims must be paid as preferred claims. *Litzenberg v. J. C. Mtge. Trust Co.*, 8 Utah 15; 28 Pac. Rep. 871.

Where one has been doing business as a merchant on capital borrowed from his relatives and is insolvent, a transfer of his property to such relatives who knew of his insolvency and which gives them a preference, will be set aside as to other creditors who were ignorant of the circumstances. *Smith v. Sipperly*, 9 Utah 267; 34 Pac. Rep. 54.

The fraud of the debtor and his assignee, in an assignment for benefit of creditors does not render the assignment void as to creditors who are thereby preferred unless they were cognizant of or in some way participated in the fraud. And the fact that one of the preferred creditors is a brother of the assignor does not *per se* render the assignment void. *Pettit v. Parsons*, 9 Utah 223; 33 Pac. Rep. 1038.

A sale of personal property in good faith, for a fair price, to an innocent purchaser, by the assignee under an assignment for the benefit of creditors, the deed of assignment not being void on its face, passes a good title. As between honest creditors of the insolvent assignor, equity will not enjoin execution sale in favor of one as against another, of property that had been sold by the assignee, where the deed of assignment has been declared void. Assignments are not such proceedings in bankruptcy as prohibit a creditor from pursuing the ordinary course of law to collect his demand. If the assignment is valid it simply removes the prop-

erty from the reach of legal process. If invalid, it has no effect. *Ogden P. & O. & G. Co. v. Child*, 37 Pac. Rep. 736 (Utah.)

The following general rules are declared with reference to assignments for benefit of creditors, subject however, to special provisions which may be found in local acts. *1st.* Antecedent and fraudulent acts of the assignor in which the assignees and beneficiaries have not participated, will not render the assignment void. *2nd.* Mere fraudulent concealment of assets by the assignor at the time of or after the deed of assignment, if done without the concurrence of the assignee or beneficiaries, will not avoid the deed. *3rd.* Fraudulent preferences or conditions in a voluntary deed of assignment, itself will avoid it, whether known to the assignee or beneficiaries or not. On this latter proposition there is considerable conflict owing to the diversity of bankrupt or insolvency laws of different states. As to absolute conveyances of sale where a valuable consideration is paid and the purchaser is ignorant of any fraud on the part of the vendor, the purchaser acquires a good title, notwithstanding the fraudulent intent of the vendor. *Coblentz v. Driver Mer. Co.*, 37 Pac. Rep. 242. (Utah.) Rehearing denied.

A voluntary deed of assignment for benefit of creditors, in which the assignee is fraudulently preferred to a large amount, is void, though he does not participate in the fraud. *Coblentz v. Driver Mer. Co.*, 37 Pac. Rep. 242. (Utah.) Rehearing denied.

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### INSOLVENCY LAW OF WASHINGTON.

The "assignment" law of Oregon was practically adopted in Washington by its code. It provides, however, for creditors filing objections to claims presented by other creditors and for hearing thereof before the court, with jury. No assignment shall be declared void for want of an inventory, and the debtor may be subjected to examination upon application by assignee or any creditor. Upon death of assignee or failure to file inventory, the court, on application of any person interested shall appoint some one to execute the trust. The same provision for discharge as in the law of Oregon prevails. The fees and commissions of assignees are the same as those of executors and administrators. Although the act is entitled as an assignment law, it has been properly construed to be an insolvency law by reason of its provisions for discharge of the debtor.

When the debtor's property once becomes vested in the assignee for the benefit of all the creditors, it cannot thereafter be divested or affected by the failure of the insolvent to procure a discharge. (Code Wash., Sec. 2046.) *Traders' Bank v. Van Wagenen*, 2 Wash. St. 172; 26 Pac. Rep. 253.

The statute (Code Wash. Sec. 2022,) having provided that when calling a meeting of creditors the court shall stay all actions against the debtor, providing that such stay shall not prevent the appointment of a receiver to care for the debtor's property "for the benefit of all the creditors," *Held*, that after an assignment, appointment of a receiver, and stay of proceedings, the court has no authority to set the stay aside and permit attachments to issue. *Id.*

An action may be maintained for a balance due on a judgment after foreclosure against an insolvent after his discharge, where the judgment had been rendered prior to the discharge and the debtor had not asked to have the judgment limited to the sale of the mortgaged premises. *Leisure v. Kneeland*, 2 Wash. St. 537; 27 Pac. Rep. 176.

A receiver may be appointed in insolvency proceedings at the instance of the insolvent, and in a proper case will be entitled to recover his fees out of the property in his custody. *Lammon v. Giles*, 3 Wash. Ter. 117; 13 Pac. Rep. 417.

In an action by the assignee against the sheriff and a creditor to recover for a wrongful attachment of the assignor's goods levied previous to the assignment, such damages as loss of profits and sales, attorney fees in the attachment, injury to business credit, etc., cannot be recovered. Such items of damage resulted from personal tort and the right of action therefor does not pass to the assignee. *Slauson v. Schwabacher*, 4 Wash. 483; 31 Pac. Rep. 329.

A corporation is not necessarily insolvent so as to render its incumbance void, while it is conducting a successful business, although its liabilities amount to more than its assets exclusive of good will. *Brooks v. S. Manf. Co.*, 37 Pac. Rep. 284. (Wash).

The rule is probably otherwise as to a corporation which has practically ceased business. *Thompson v. Lumber Co.*, 4 Wash. 600.

The law of 1890 (1 Hill's Code, Secs. 2741, 2755) relating to assignments for the benefit of creditors repeals the insolvent law of 1881. 1 Hill's Code, Secs. 2756, 2793 relating to the same subject matter. *Mansfield v. First Nat. Bank*, 5 Wash. 665; 32 Pac. Rep. 789; *Id.* 999.

B & A being indebted to the bank on a renewal note not yet due, informed the bank they were in insolvent circumstances, and to secure the bank they gave a new note payable on demand and a mortgage on their entire stock of goods. Shortly afterwards the bank took possession and commenced foreclosure pro-

ceedings. B & A then made an assignment for the benefit of creditors. *Held*, the assignee was entitled to recover from the bank the stock of goods, the mortgage to it being fraudulent as to creditors. *Id.*

A chattel mortgage given to secure a bona fide debt will not be set aside as fraudulent where the only evidence of fraud is that it was given only two days prior to making the assignment for the benefit of creditors. *Benham v. Ham*, 5 Wash 128; 31 Pac. Rep. 459.

Property assigned for the benefit of creditors and in possession of the assignee is in *custodia legis*, and is not attachable on the ground that the assignment is fraudulent and void. *Hamilton-Brown Shoe Co. v. Adams*, 5 Wash. 333; 32 Pac. Rep. 92.

Where property is attached in the hands of an assignee for the benefit of creditors, the assignee should entitle his petition in the matter of the assignment, instead of as an intervention in the attachment case. Such error, however, is not ground for reversing an order restoring the property to the assignee. *Sabin v. Adams*, 5 Wash. 768; 32 Pac. Rep. 793.

Where an insolvent debtor confessed judgments in six actions brought by his relatives, by an attorney who was formerly his attorney, all of said judgments having been confessed in one day, and he afterwards makes a general assignment for the benefit of creditors, the judgments in favor of his relatives will be set aside at the suit of other judgment creditors. The Act of 1890 of Washington is construed as an insolvent law for the reason that it provides for a discharge of the debtor from all his debts. *Hyman v. Barman*, 6 Wash. 516; 33 Pac. Rep. 1076.

The repeal of the Insolvent Act of 1881, by the Assignment Act of 1890, did not put an end to insolvency proceedings already commenced under the former act, although no assignee had yet been appointed in such proceeding. *Ewing v. Van Wagenen*, 6 Wash. 39; 32 Pac. Rep. 1009.

An assignment for the benefit of creditors under the statute of Washington, prevents the foreclosure of a mechanics' lien against the insolvent's property unless leave to prosecute the foreclosure is given by the court. Unless such leave has been given, the assignee may maintain an action to restrain the foreclosure proceedings. *Quinby v. Slipper*, 7 Wash 475; 35 Pac. Rep. 116.

The mere appointment of an assignee for benefit of creditors does not give him right to possession of chattels which the assignor has mortgaged, and of which the sheriff has taken possession at the direction of the mortgagee for condition broken and

for purpose of foreclosure. An action by the assignee attacking the mortgage for fraud should first be tried and the assignee's superior right determined before the sheriff should be required to surrender possession to him. *Sanders v. Main*, 36 Pac. Rep. 1049. (Wash.)

An order by a landlord on the agent to pay rents collected, to the mortgagee of the premises does not entitle the mortgagee to the rent, as against an assignee for the benefit of the landlord's creditors. *In re Cleary*, 38 Pac. Rep. 79. (Wash.) *Stern v. Carlsrud*, *Id.*

A creditor cannot recover goods transferred by his debtor with intent to defraud from one purchasing in good faith without refunding to the purchaser the part of the price paid. *Martin v. Mathews*, 38 Pac. Rep. 1001. (Wash.)

Persons receiving from an insolvent insurance company pending proceedings for the revocation of its charter, assets in payment of claims due, are not *bona fide* purchasers. *Smith v. Hopkins*, 38 Pac. Rep. 854. (Wash.)

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### ASSIGNMENT LAW OF WYOMING.

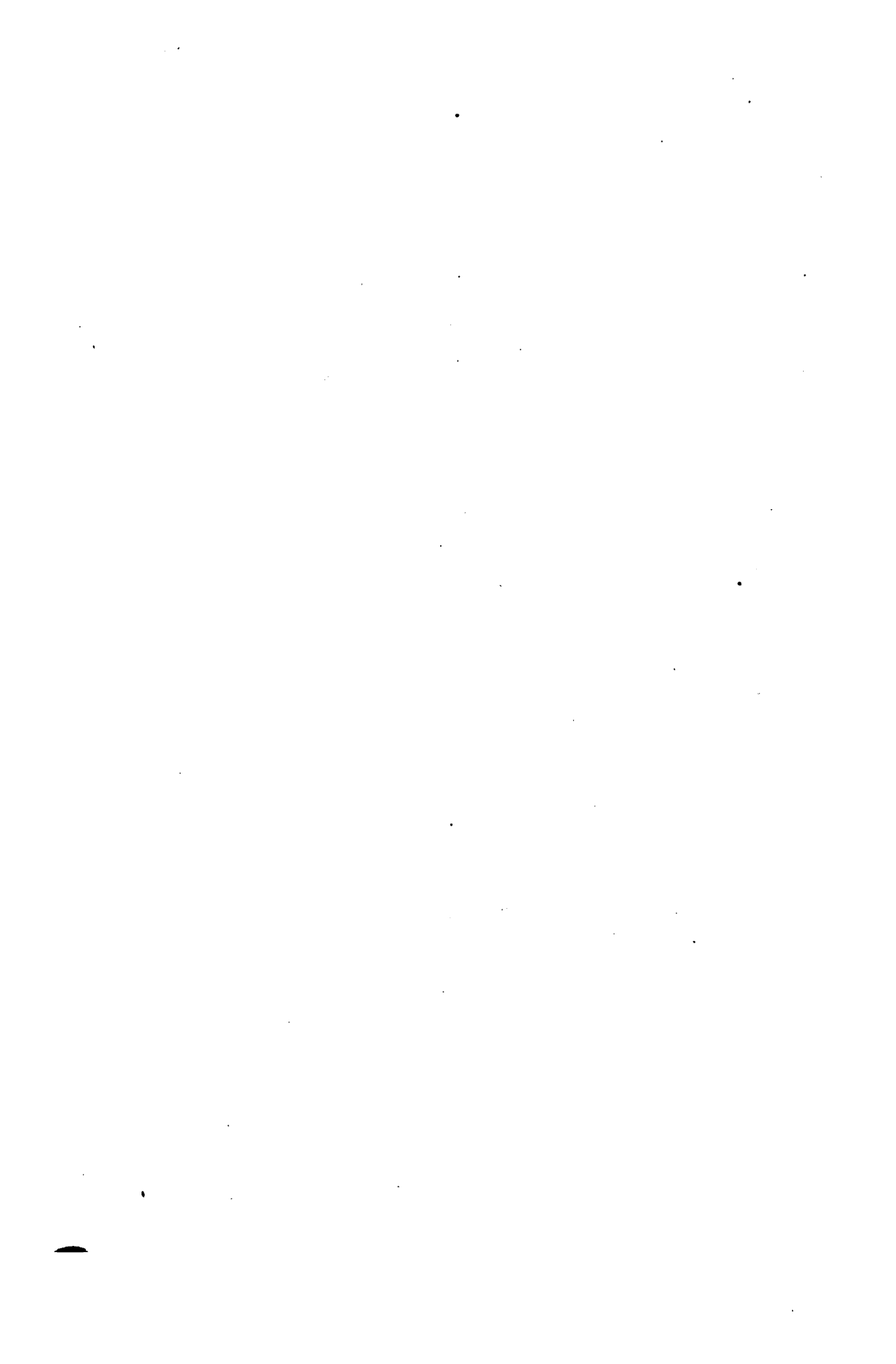
Assignments are permitted by a statute of 1890. The assignee gives bond in double the value of the assigned property, and creditors accepting dividends are required to release the debtor from all further liability. Attachments already levied are not affected by the assignment unless otherwise dissolved.

A creditor is entitled to dividends only on the debt actually due him, and the amount of negotiable bonds of the insolvent which really represent no indebtedness but are held by the creditor as collateral security, cannot be considered in computing his dividend. *International Trust Co. v. Union Cattle Co.*, 31 Pac. 408; 3 Wyo. 803; *American L. and T. Co. v. Same*, *Id.*

The statute of Wyoming does not require that a deed of assignment for benefit of creditors shall provide for the disposition of dividends of creditors who refuse to accept them and release the debtor, but this fact does not convert an assignment under the statute to one at common law. *Downes v. Parshall*, 26 Pac. Rep. 994. (Wyo.)

The state has no preference in the distribution of the estate of an insolvent who has made a valid deed of assignment for the benefit of creditors. *State v. Foster*, 38 Pac. Rep. 926. (Wyo.) *Board of Com'rs of Laramie County v. Same*, *Id.*

A payment or dividend to the state or to a county from an insolvent estate cannot release the unpaid portion of its debt. *Id.*





# CIVIL CODE OF CALIFORNIA.

## PART II.

### SPECIAL RELATIONS OF DEBTOR AND CREDITOR.

#### TITLE I.

##### GENERAL PRINCIPLES.

SECTION 3429. A debtor within the meaning of this title, is one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability is certain or contingent.

Orders drawn by creditors upon their debtor, and accepted by the latter, operate as an assignment of so much of the debt as is represented by the orders, and a transfer of property by the debtor (who was originally a guarantor on a contract for payment of money) which is fraudulent as against the original creditors, will be fraudulent as against the assignee. *Hobart v. Tyrrell*, 68 Cal. 12.

Certain letters written to the plaintiff by the defendant examined and held to be a sufficient acknowledgment of his indebtedness to constitute a contract, obligation or liability founded upon an instrument in writing. *Osment v. McElrath*, *Id.* 466.

SECTION 3430. A creditor within the meaning of this title, is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money.

SECTION 3431. In the absence of fraud, every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract.

See notes under section 3442 *infra*.

SECTION 3432. A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another.

And an assignment for the benefit of creditors may provide for any subsisting liability of the assignor which he might lawfully pay, whether absolute or contingent. Section 3452, *infra*.

That a debtor although admittedly insolvent may pay or secure one creditor in preference to others, and for this purpose may transfer his property, or mortgage or pledge it, has been so frequently held in this state both before and since the adoption of

the codes that no attempt is here made to cite all of the decisions. Following are some of them, together with cases also holding that transfers are not necessarily fraudulent because of a want of valuable consideration. These and others will be found in notes under sections 3439 to 3442. *Priest v. Brown*, 100 Cal. 626; *Wetherby v. Straus*, 93 *id.* 283; *Bull v. Bray*, 89 *id.* 289; *Saunderson v. Broadwell*, 82 *id.* 132, and cases there cited, including *Dana v. Stanfords*, 10 *id.* 269, where the previous cases are cited.

There is a series of cases in Nebraska upon this subject, but having special reference to mortgages given by the debtor, which are worthy of being consulted because of their perspicuity as well as for their thorough review of authority. The later ones of *Hewitt v. Commercial Banking Co.*, 59 N. W. Rep. 693; *Meyer v. Union Bag & Paper Co.*, *Id.* 696; and *John F. Farwell Co. v. Wright*, 56 N. W. Rep. 984; 38 Neb. 878, cite their predecessors. The insolvency law of that state contains the provision that if a person insolvent, or contemplating insolvency, within thirty days before assigning, transfers any part of his property to a person who then has reasonable cause to believe him insolvent, or contemplating insolvency, and that such transfer is made with a view to prejudice the assignment, such transfer shall be void. This statute was held not to prejudice a person's common law right to prefer his creditors, and, no assignment having been actually made, the section does not apply. *Kavanaugh v. Oberfelder*, 56 N. W. Rep. 316; 37 Neb. 647.

SECTION 3433. Where one creditor is entitled to resort to each of several funds for the satisfaction of his claims, and another person has an interest in, or is entitled as a creditor to resort to some but not all of them, the latter may require the former to seek satisfaction from those funds to which the latter has no such claim, so far as it can be done without impairing the right of the former to complete satisfaction, and without doing injustice to third persons.

## TITLE II.

### FRAUDULENT INSTRUMENTS AND TRANSFERS.

SECTION 3439. Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.

For arrest of certain fraudulent debtors see Sec. 479, Subs. 4-5, C. C. P. Cal.

And for criminal proceedings see Pen. Code Secs. 154, 531, Cal.

See also Sec. 1214 C. C. Cal. as to conveyances void as to subsequent purchasers and mortgagees.

Actual fraud is defined in Sec. 1572, and constructive fraud in Sec. 1573 C. C. Cal.

The provisions of Sec. 479 C. C. P., correspond to Sec. 73 of the Old Practice Act.

Section 73 of the Practice Act was considered in the cases of *Southworth v. Resing*, 3 Cal. 378, where the first subdivision of the section which authorized an arrest for "willful injury to character or person" was declared unconstitutional. And in *Ex parte Prader*, 6 *id.* 239, where it was said assault and battery did not constitute "fraud." That provision has not been included in the code.

See also the early cases of *Soule v. Hayward*, 1 *id.* 345; *In re Haldforth*, *Id.* 438; *Snow v. Halstead*, *Id.* 361; *Mattoon v. Elder*, 6 *id.* 60; *Belden v. Henriques*, 8 *id.* 87, and *Davis v. Robinson*, 10 *id.* 411, where Sec. 73 is construed; see also *Smith v. "49"* and "56" M. Co., 14 *id.* 242; *Taylor v. Robinson*, *Id.* 396; *Cassin v. Marshall*, 18 *id.* 689.

Conclusive proof is not contemplated by the statute. *White v. Lazinsky*, 14 *id.* 166.

Subsequent acts and circumstances are sometimes resorted to to prove fraud. *Butler v. Collins*, 12 *id.* 457.

In this class of cases the fraudulent intent is a question of fact for the jury. *Miller v. Stewart*, 24 *id.* 502.

Where one of two persons must suffer by the fraud of another, the one who induced or enabled it is the one to suffer. *Poorman v. Mills*, 39 *id.* 345. (Maxims C. C. Cal. Sec. 3543.)

Where burden of proof is upon attaching creditor. *Thornton v. Hook*, 36 *id.* 223; *Marshall v. Buchanan*, 35 *id.* 264; *Tully v. Harlowe*, *Id.* 302.

Where there is no consideration, a sale to effect a fraud may be set aside although the grantee was ignorant of the fraud intended. *Lee v. Figg*, 37 *id.* 328, and the more recent cases of *Ross v. Sedgwick*, 69 Cal. 247; *Cerf v. Phillips*, 75 *id.* 185; *Ingram v. Smith*, 83 *id.* 234; *Hart v. Mead*, 84 *id.* 245; *Judson v. Lyford*, *Id.* 505; *Mason v. Vestal*, 88 *id.* 396; *Bull v. Bray*, 89 *id.* 286; *Francisco v. Aguirre*, 94 *id.* (dissenting opinion) 188.

SECTION 3440. Every transfer of personal property other than a thing in action or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage when allowed by law and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of

possession of the things transferred, to be fraudulent and therefore void against those who are his creditors while he remains in possession and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer; *provided, however*, that the provisions of this section shall not apply to the transfer of wines in the wineries or wine cellars of the makers or owners thereof, or other persons having possession, care and control of the same, and the pipes, casks, and tanks in which the said wines are contained, which transfers shall be made in writing, and certified and acknowledged and verified in the same form as provided for chattel mortgages, and which shall be recorded in the book of miscellaneous records in the office of the county recorder of the county in which the same are situated. [*In effect 60 days from March 12, 1895.*]

This section as adopted in the original Civil Code of California had its precedent in the Act of April 19, 1850. (Stats. 1850-1853, pp. 199, 203.) The act contained nineteen sections, and many of its provisions have been incorporated in other sections of the codes, section 15 thereof being the one most immediately corresponding with section 3440 of the Civil Code. There are but few sections or provisions of our laws that have been more frequently cited or reviewed in the decisions of the Supreme Court of California. The proviso in relation to wines, etc., constitutes the amendment of 1895. Following are some of the earlier cases:

Change of possession, characteristics of. *Gardet v. Belknap*, 1 Cal. 399. Continued change must be actual, not constructive. *Fitzgerald v. Gorham*, 4 *id.* 289; *Van Pelt v. Littler*, 10 *id.* 394, and same case 14 *id.* 194. Delivery. *Cartwright v. Phoenix*, 7 *id.* 281. Fraudulent intent. *Swartz v. Hazlett*, 8 *id.* 128. A few of the later cases which discuss the subject more fully are *Cahoon v. Marshall*, 25 *id.* 198. Actual and continued change. *Ford v. Chalmers*, 28 *id.* 13; *Woods v. Bugby*, 29 *id.* 467; *Thornton v. Hook*, 36 *id.* 223; *Godchaux v. Mulford*, 26 *id.* 316. And under the code, the following cases may be cited as sufficiently covering the ground:

The sale is void even though the vendee gets possession before the goods are levied on. *Watson v. Rogers*, 53 *id.* 401. As to Mortgage. *Martin v. Thompson*, 63 *id.* 4. Assignee in insolvency. *Merrill v. Hurlburt*, 63 *id.* 494. Sale by partner to partner and rights of executrix. *Kelly v. Murphy*, 70 *id.* 560.

On the question of actual and continued change of possession of a lot of live stock, the fact that the stock was on the land then belonging to the vendee, and continued thereon after the alleged sale should be taken into consideration. *Banning v. Marleau*, 101 *id.* 238. It is held error to instruct the jury to the effect

that the vendee is to be considered as having actually received property when it is so situated that he is entitled to and can rightfully take possession of it. *Pearce v. Boggs*, 99 *id.* 340.

In case of sale of a lot of hay by husband to wife, the hay being raised and still remaining on their homestead premises where it was to be fed to stock belonging to the wife, the question of whether there was an actual and continued change of possession should be left to the jury, and it was error to instruct the jury to find a particular way. *Porter v. Bucher*, 98 *id.* 454.

As to sale or gift from father to son. *Dale v. Purvis*, 78 *id.* 113. Gift by husband to wife. *Morgan v. Ball*, 81 *id.* 93. Generally. *Bernting v. Saltz*, 84 *id.* 168. What constituted actual and continued change. *Claudius v. Aguirre*, 89 *id.* 501. Bark of trees becomes personal property upon removal, change of possession required on sale. *Moisant v. McPhee*, 92 *id.* 76.

The section is also cited or construed in the following additional cases: *Hart v. Mead*, 84 *id.* 245; *Beamer v. Freeman*, *Id.* 557; *Bull v. Bray*, 89 *id.* 289; *Etchepare v. Aguirre*, 91 *id.* 295; *Francisco v. Aguirre*, 94 *id.* 187; *In re Fisher*, 94 *id.* 525; *Festhal v. Myles*, 53 *id.* 625; *McFadden v. Mitchell*, 54 *id.* 629; *Williams v. Lerch*, 56 *id.* 333; *Dean v. Walkenhorst*, 64 *id.* 79; *Bell v. McClellan*, 67 *id.* 284; *Ross v. Sedgwick*, 69 *id.* 249; *Hogan v. Cowell*, 73 *id.* 212; *McClain v. Buck*, *Id.* 323; *Gould v. Huntley*, *Id.* 401; *Callender v. McLeod*, 74 *id.* 379; *Oro M. & M. Co. v. Starr*, 76 *id.* 168; *Machine Works v. Connolly*, *Id.* 307; *Ruddle v. Givens*, *Id.* 459; *Tregear v. Etiwanda W. Co.*, *Id.* 540; *Byrnes v. Hatch*, 77 *id.* 244; *Brown v. Bk. of Napa*, *Id.* 546.

SECTION 3441. A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement by legal process, of his right to take the property affected by the transfer or obligation.

That fraud is not presumed, that intent is question of fact, and where homestead is the subject of the transfer, a creditor cannot object, because it was property which was exempt, and fraud of the owner could not obstruct any right of the creditor. *Wetherly v. Straus*, 93 Cal. 283.

Where the officers and stockholders of one corporation form another, and convey all the property of the former to the new one, in fraud of creditors of the former, the latter will be regarded as a continuation of the former and a court of equity will hold the assets of the latter liable for a debt of the former, though there has been no recovery of judgment for the debt, and return of execution unsatisfied, although Sec. 3441, C. C. is construed to embody the general rule that a creditor must first have recovered judgment and had execution thereon returned unsatisfied, before

he is entitled to resort to equity to reach property fraudulently transferred by his debtor. *Blanc v. Paymaster M. Co.*, 95 *id.* 524. As to the fraud in such transaction see *S. F. & N. P. R. R. v. Bee*, 48 *id.* 398.

As to transfers conclusively presumed fraudulent as to creditors, see notes under Secs. 3440 *ante*, and 3442 as amended in 1895 *infra*.

The assignment is also declared void as against creditors and innocent purchaser unless recorded, etc. Secs. 3461, 3463, 3465 *infra*.

A conveyance which is made and is accepted with intent to prefer one creditor is not invalidated by the fact that it is not made directly to the creditor, nor that it is not for cash in hand, but in consideration of notes given by the purchaser. Nor will such transfer be set aside as void because of fraud practiced by the debtor upon certain of his creditors, where the purchaser is innocent of the fraud. *Priest v. Brown*, 100 Cal. 626.

SECTION 3442. In all cases arising under section twelve hundred and twenty-seven, or under the provisions of this title, except as otherwise provided in section thirty-four hundred and forty, the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration; *provided, however*, that any transfer or incumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent and void as to existing creditors. [*In effect sixty days after March 26, 1895.*]

The amendment consists solely of the *proviso* added to the original section. It has always been conceded in this state that a debtor, although insolvent, could make a transfer or mortgage to one or more creditors in preference to others, and that in the absence of fraud every contract of a debtor is valid as against existing or subsequent creditors who have not acquired a lien. Secs. 3431, 3432 C. C. *ante*.

The use of the words "*voluntarily*, or without valuable consideration," should doubtless be construed as meaning the same thing, "*voluntarily*" not being construed as referring to the "*volition*" of the maker, but meaning "*gratuitous*" or without valuable consideration.

It would seem that the purpose of this amendment is to leave the question of fraudulent intent still one of fact, and to retain the rule that fraud is not presumed but must be proven, and also that fraud is not proven solely by showing want of valuable consideration, except as to transfers made by a debtor who is insolvent.

ent or is contemplating insolvency at the time of making the transfer. The fact of insolvency or contemplation of insolvency, by the amendment, renders that conclusively fraudulent as to existing creditors which was formerly presumptively fraudulent. See *Morgan v. Hecker*, 74 Cal. *infra*; *Bull v. Bray*, 89 *id.* 287.

Repeals by implication are not indulged and there is no expressed intention in the amendment to repeal section 3431 of the code which declares every contract of a debtor valid as against existing or subsequent creditors, in the absence of fraud. It is therefore suggested that a gift made, as in the case of *Bull v. Bray*, 89 Cal., *supra*, (where the grantor was in fact insolvent, though not aware of the fact) might be held not affected by this amendment. Section 3431 remains as much a part of the code since, as it was before the amendment of 3442, and they must be construed together. Section 3431 evidently has reference to actual fraud, while the amendment to 3442 is broad enough, standing alone, to avoid the deed for constructive fraud.

Among the leading cases in California under section 3432 C. C. to the effect that a debtor admittedly insolvent may prefer one or more of his creditors, and that his assignment of property for that purpose is not necessarily void, are *Wood v. Franks*, 67 Cal. 32; same, 56 Cal. 217; *Lawrence v. Neff*, 41 Cal. 566; *Dana v. Stanfords*, 10 Cal. 269.

See notes under that section, *ante p.*

Early cases—

Intent a question of fact. *Miller v. Stewart*, 24 Cal. 502. The statute does not contemplate conclusive proof of fraudulent intent. *White v. Lazinsky*, 14 *id.* 166. Intent seldom capable of positive proof, but may be gathered from circumstances. *Purkitt v. Polack*, 17 *id.* 327. Subsequent acts may be resorted to in proving antecedent fraud as being illustrative of intent. *Butler v. Collins*, 12 *id.* 457; *McDaniel v. Baca*, 2 *id.* 326. And contemporaneous acts. *Cohn v. Mulford*, 15 *id.* 50. Inadequacy of price admissible but not alone sufficient. *Smith v. Randall*, 6 *id.* 47. Fraudulent statement of value. *Gifford v. Carvill*, 29 *id.* 589; *McCarthy v. White*, 21 *id.* 495. Generally. *Landecker v. Houghtaling*, 7 *id.* 391; *Adams v. Hackett*, *Id.* 187; *King v. Davis*, 34 *id.* 100.

Where there was no consideration, a sale to effect fraud was set aside. *Lee v. Fig*, 37 *id.* 328.

Later cases—

It was held error to instruct the jury to find the transfer void if there was no good or valuable consideration therefor. Also.

erroneous to instruct that if the consideration was an existing debt, the amount of the debt must bear a reasonable proportion to the value of the property transferred. *McFadden v. Mitchell*, 54 Cal. 629.

The question of fraudulent intent is one of fact, not of law. *Read v. Rahm*, 65 *id.* 344.

A voluntary gift without consideration only creates a *prima facie* presumption of an intent to defraud, which may be rebutted; the question of intent being one of fact, not of law. *Morgan v. Hecker*, 74 *id.* 541.

A finding that a mortgage was given without consideration, in the absence of a finding that it was given with intent to defraud, will not support a decree ordering the proceeds of the property to be first applied in satisfaction of plaintiff's demand. *Bewick v. Muir*, 83 *id.* 369.

The intent of the grantor is the subject for inquiry; the intent of the grantee is immaterial. A deed in fraud of creditors is void as against them, and an execution sale of the debtor's interest carries the legal title. *Judson v. Lyford*, 84 *id.* 508.

A *bona fide* transfer of goods at a reasonable valuation to a creditor in payment of a debt, is not fraudulent even if the assignor did then contemplate making a general assignment. And such payment may be received by an attorney for a debt due him and to secure his fees in the matter of an assignment or insolvency. *In re Luce*, *McDonald & Torrence*, 83 Cal. 303, 309.

In an action to set aside deed of gift from husband to wife, it is necessary to find specifically that the deed was given with fraudulent intent. A finding that it was without consideration is not sufficient. Insolvency is not presumable from the said finding. *Bull v. Bray*, 89 *id.* 289.

And in such action where the deeds were made more than five years before execution upon the judgment was returned unsatisfied, a finding that the deeds were made without any fraudulent intent will not be set aside, where there is no proof of insolvency of the debtor at the time of the transfer. *Windhans v. Bootz*, 92 *id.* 617.

The transfer is not void or fraudulent as against existing creditors merely because it is not made for a valuable consideration. *Id.*

It is necessary to allege fraudulent intent in an action to set aside a deed as void or fraudulent as to creditors. *Wetherly v. Straus*, 93 *id.* 283.

A debtor being entitled to prefer a creditor is not required to



make transfer or payment directly to the creditor, but may transfer to a third person to pay the proceeds to the creditor. A transfer for such purpose need not be made for cash in hand, and the fact that an insolvent debtor, who conveyed his land with the avowed intention of paying the proceeds to certain creditors, did not pay the creditors, will not affect the title of the purchaser, if the purchase was made in good faith. *Priest v. Brown*, 100 *id.* 626.

Payment to an attorney of an existing indebtedness and a reasonable compensation for services to be rendered may be made by an insolvent debtor, and such payment may be made in goods at a fair valuation, even though an assignment for benefit of creditors is contemplated at the time of such payment. *In re Luce et al.*, 83 Cal. 303.

### TITLE III.

#### ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

SECTION 3449. An insolvent debtor may, in good faith, execute an assignment of property in trust for the satisfaction of his creditors, in conformity to the provisions of this chapter, *subject, however*, to the provisions of this code relative to trusts and fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, by corporations, or by other specific classes or persons. Every such assignment shall contain a list of the names of the creditors of the assignor, and their places of residence and amounts of their respective demands, and the amounts and nature of any security therefor, and shall, subject to the other provisions of this section, be made to the sheriff of the county, or city and county, wherein the assignor resides, if the assignor resides within this state; or in case the assignor resides out of this state, then to the sheriff of the county, or city and county, wherein the property assigned, or some of it, is situated; but when the assignor resides out of the state, an assignment made as herein provided may, by its terms, transfer any property of the assignor in this state. The sheriff shall forthwith take possession of all the property so assigned to him, and keep the same till delivered by him, as hereinafter provided.

When the assignment has been made, as herein provided, the sheriff shall immediately, by mail, notify the creditors named in the assignment, at their places or residence as given therein, to meet at his office on a day and hour to be appointed by him, of not less than eight nor more than ten days from the date of the delivery of the assignment to him, for the purpose of electing one or more assignees, as they may determine, in the place and stead of the said sheriff in the premises, and shall also publish a notice of such meeting, and the purpose thereof, at least once before such meeting, in some newspaper published in his county, or city and county. The notice so to be mailed shall also contain a statement of the amount of the demand of the creditor, and the amount and nature of any security there-

for, as set forth in the assignment; and if any creditor shall not find the amount of his claim to be correctly so stated, he may file with said sheriff, at or before such meeting, a statement, under oath, of his demand, and such statement shall, for the purpose of voting as hereinafter provided, be accepted by said sheriff as correct; and when no such statement is filed, the statement of amount as set forth in the assignment shall be accepted by the sheriff as correct.

No creditor having a mortgage or pledge of real or personal property of the debtor, or lien thereon, for securing the payment of a debt owing to him from the debtor, shall be allowed to vote any part of his claim at such meeting of creditors, unless he shall have first conveyed, released, or delivered up his said security to said sheriff, for the benefit of all creditors of said assignor. At such meeting the sheriff shall preside, and a majority in amount of demands present or represented by proxy shall control all questions and decisions. The creditors may adjourn such meeting from time to time, and may vote on all questions, either in person or by proxy, signed and acknowledged before any officer authorized to take acknowledgments, and filed with the sheriff. At such a meeting, or any adjournment thereof, the creditors may elect one or more assignees from their own number, in the place and stead of the sheriff, and the person or persons so elected shall afterwards be the assignee or assignees under the provisions of this title; and the sheriff, by transfer in writing, acknowledged as required by section three thousand four hundred and fifty-eight, shall at once assign to such elected assignee or assignees, upon the trusts in this title provided, all the property so assigned to him, and deliver possession thereof.

All recitals in such assignment by said sheriff of notices of such meeting, and the holding thereof, and of the due election of such assignee or assignees, shall be *prima facie* proofs of the facts recited. The sheriff shall, before the delivery of such assignment, be paid the expenses incurred by him, and fees in such amount as would by law be collectible if the property assigned had been levied upon and safely kept under attachment. Thereupon, and after the record of such last named assignment, as in this title provided, such elected assignee or assignees shall take, and hold, and dispose of all such property and its proceeds, upon the trusts and conditions and for the purposes in this title provided. [*In effect sixty days from March 26, 1895.*]

Section 3449, as originally enacted, was like the first complete sentence of the section as now amended except that it provided that the assignment could be made to "one or more assignees."

In 1889 (Stat. p. 80) the section was amended so as to require the assignment to be made to the sheriff.

The distinction between the amendments of 1889 and of 1895, is, that the latter requires secured creditors to surrender their security for the benefit of all the creditors before being entitled to vote for an assignee. These amendments have not been under review by the Supreme Court in any of the reported cases.

Punishment is provided against certain fraudulent transfers under section 154 Penal Code.

That fraudulent intent is a question of fact, not of law, see *Morgan v. Hecker*, 74 Cal. 540, and see 3442 and notes *ante* p.

A creditor is defined as one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money. Cal. C. C. Sec. 3430.

And a debtor is defined as one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability is certain or contingent. Cal. C. C. Sec. 3429.

The provisions of the Civil Code relating to assignments for benefit of creditors were not repealed by the Insolvent Act of 1880. *Hecht v. Green*, 61 Cal. 269; *Barrilhoit v. Fisch*, 63 *id.* 462.

Section 39 of the Insolvent Act of 1852, prohibited assignments for the benefit of creditors, except as provided in that act, but it was held that the transfer to a receiver, by order of the court, or the effects of an insolvent, in a suit by a judgment creditor, is not an assignment absolutely void under the Insolvent Act of 1852, but only void as against the claims of creditors. *Naglee v. Lyman*, 14 Cal. 451.

An assignment for benefit of creditors which does not include all the debtor's property will be held void, unless it appears that the omitted property is exempt from execution. *Aylesworth v. Dean*, 12 Pac. Rep. 241. (Cal.)

Where a person takes an assignment of personal property, under an agreement with the assignor that out of the proceeds he will pay a debt due from the assignor to a third person, the assignee assumes the relation of trustee to the creditor and is liable to a direct action by the latter for the debt. *Lockwood v. Canfield*, 20 Cal. 126.

Where one in failing circumstances assigns a bill of lading of goods not yet arrived and not paid for, to another in trust to secure the vendor, the assent of the vendor will be presumed, the transaction being for his benefit. *Le Cacheux v. Cutter*, 6. Cal. 514.

An assignment of property to a creditor, by which he is authorized to sell the same at public auction and apply the proceeds first, to the payment of his claim and second, to distribute the residue *pro rata* among the creditors of the debtor, was held not to contravene section 39 of the Insolvent Act of 1852, which prohibited assignments by insolvent debtors, otherwise than as provided in that act. *Morgantham v. Harris*, 12 Cal. 245. (There was no evidence of the insolvency of the assignor, nor of fraud.)

Where a debtor enters into an agreement with his creditors, by which a person named in the agreement takes possession and charge of the debtor's property to sell and dispose of it, the net proceeds to be applied to the payment of debts, and the creditors control and direct the trustee in the management of the business, the debtor is entitled to be credited on his indebtedness with the proceeds in the hands of the trustee, and is not obliged to look to the trustee if such proceeds are not properly applied. *Gschwend v. Estes*, 51 Cal. 134.

An assignment by a debtor of all his property for the benefit of creditors, does not preclude him from afterwards applying for and receiving a discharge in insolvency. *Dresbach v. His Creditors*, 63 Cal. 187.

The Insolvency Act of 1852, section 39 declared that "no assignment of any insolvent debtor, otherwise than as provided in this act, shall be legal or binding upon creditors." Prior to that time the common law assignment was recognized in this state. Upon the enactment of the codes (1873) sections 3449 *et seq.* had the effect of repealing *pro tanto* section 39 of the Act of 1852, and thereafter while the Act of 1852 remained in force, the two systems of assignments were not necessarily antagonistic, and the latter was not entirely exclusive. *Dresbach v. His Creditors*, 63 Cal. 187.

An assignment by a partnership for the benefit of creditors dissolves the partnership, and exempt property subsequently delivered to them by the assignee belongs to the partners severally and not to the partnership. Such transfer of the property does not revive the partnership. *Wells v. Ellis*, 68 Cal. 243.

An assignment for benefit of creditors by partners, of all of their partnership and individual property is void as to creditors, if it gives a preference to partnership creditors in the individual property. *O'Kane v. Hyde*, 70 Cal. 6.

Assignment for the benefit of creditors is voluntary and the assignment passes nothing to the assignee which is not in fact included in the deed of assignment. Where such deed excepts a quarter section of land as a homestead, valued at five thousand dollars, no right to that property is conferred upon the assignee even as to the excess of five thousand dollars. *Wilhoit v. Bryant*, 78 Cal. 263.

Under an assignment for the benefit of creditors the assignees have no power to dispose of the property until the inventory and affidavit are filed and they give their bond, but the estate passes to them upon the execution of the assignment. *Bryant v. Langford*, 80 Cal. 543.

The object of the law is to enable a debtor, through his assignee, to dispose of his property for the benefit of his creditors, and sales of the debtor's property under executions, upon judgment recovered since the assignment, will be restrained. Such sales, although the judgment was recovered since the assignment, would create a cloud upon the title of the assignee. *Wilhoit v. Cunningham*, 87 Cal. 453.

Where property had been attached and the attachments were dissolved by insolvency proceedings, the insolvency proceedings being subsequently dismissed, the attachments did not become merged in judgments afterwards obtained in the same suits. And an assignment for the benefit of creditors having been made subsequent to the discontinuance of the insolvency proceedings, but before the recovery of the judgments, the property assigned cannot be sold under executions issued on such judgments. *Id.*

A deed of conveyance for the benefit of creditors is controlled by the provisions of the Civil Code relating to trusts. (Secs. 3449, 863, 864.) It divests the assignor of his entire interest in the property assigned, subject only to the right to receive the residuum after the creditors are satisfied. The assignment may be made without consulting creditors and without their consent. *Id.*

An insolvent debtor may pay his attorney by turning over goods or chattels to him at a fair valuation and in proportion to a reasonable fee for the services expected of the attorney, where no fraudulent intent exists, and where the goods are not to be returned to the insolvent, even though they then anticipate an assignment for the benefit of creditors. *In re Luce, et al.*, 83 Cal. 303.

Money in the hands of an assignee under an assignment for the benefit of creditors is not held as a special deposit by or for the creditors and cannot be specifically claimed by any or all of the creditors, and hence cannot be garnisheed in the hands of the assignee on a judgment in favor of a creditor, nor when deposited by the assignee with the court to await directions as to its proper application. *Dunsmoor v. Furstenfeldt*, 88 Cal. 522.

A debtor may make an assignment for the benefit of creditors without consent of the latter and when such assignment is made the creditors must avail themselves of it without preference or not at all. (Sec. 3457 C. C.) *Wilhoit v. Cunningham*, 87 Cal. 457.

It is not against public policy for one to relinquish his property in payment of his honest debts. *La Point v. Blanchard*, 101 Cal. 552.

SECTION 3450. A debtor is insolvent, within the meaning of this title, when he is unable to pay his debts from his own means as they become due.

The definition of an "insolvent" given in section 3450 C. C., relating to assignments for the benefit of creditors is also a correct definition of insolvency under the Insolvent Act of 1880. *Washburn v. Huntington*, 78 Cal. 573; *Sarcey v. Lobree*, 84 *id.* 48. As to a "trader" see *Bell v. Ellis*, 33 *id.* 620.

A debtor is not insolvent within the meaning of the law if he has sufficient resources or means to pay all his debts as they become due in the ordinary course of business, though he may not have sufficient money on hand or in bank to meet them or to pay a particular debt *in money*, when due. A finding that a debtor was not insolvent at the time of making a transfer of property will be sustained where the evidence shows that he had property enough to pay all his debts and intended to pay them all and did not contemplate insolvency, although he was then under attachment for a small amount and did not have *money on hand* to pay all his debts then due. (*Beatty, C. J.* and *Thorn-ton, J.*, dissent.) *Sarcey v. Lobree*, 84 Cal. 41.

For definition of "insolvent" see, also *Clarke v. Mott*, 33 Pac. Rep. 884, (Cal.); *Thompson v. Paige*, 16 Cal. 78; *Hunt v. His Creditors*, 9 *id.* 46; *Brooks v. S. Manf. Co.*, 37 Pac. Rep. (Wash.) 284; *Thompson v. Lumber Co.*, 4 Mont. 600; *Teitig v. Roseman*, 12 Mont. 404; 31 Pac. Rep. 371.

SECTION 3451. The provisions of this title do not prevent a person residing in another state or country from making there, in good faith and without intent to evade the laws of this state, a transfer of property situated within it, but such person cannot make a general assignment of property situated in this state for the satisfaction of all his creditors, except as in this title provided; nor do the provisions of this title effect the power of a person, although insolvent, and whether residing within or without this state, to transfer property in this state, in good faith, to a particular creditor for the purpose of paying or securing the whole or a part of a debt owing to such creditor, whether in his own right or otherwise. [*In effect March 7, 1889. Stats. p. 82.*]

The original section read as follows: "The provisions of this title do not prevent a person residing in another state or country from making there, in good faith and without intent to evade the laws of this state, a transfer of property situated within it; nor do they affect the power of a person although insolvent and within this state, to transfer property to a particular creditor for the purpose of paying or securing the whole or a part of a debt owing to such creditor, whether in his own right or otherwise."

The declaration in the amendment "but such person cannot

make a general assignment of property situated in this state for the satisfaction of all his creditors, except as in this title provided," constitutes the more material part of the amendment, and contradistinguishes our policy from that which has been declared by courts of other states, that an assignment for the benefit of creditors made in conformity with the law of the state where it is executed, will affect property located in another state to the extent at least, of sustaining the assignment against attachments of foreign creditors. See *Barnett v. Kinney*, 147 U. S. 476 *infra*. It is a serious question whether this declaration of our code would be sustained in the Federal Courts.

The code commissioners in their note to section 3432, say with reference to the power or right of a debtor to pay or secure particular creditors: "This has been the invariable rule in this state," citing several of the earlier decisions, and that this section makes sections 3432 and 3449 perfectly consistent and harmonizes the authorities cited from California and other Supreme Courts."

That transfers of property made to pay or secure a particular creditor or creditors are not regarded as "assignments" under this title. See notes under section 3432 *ante*.

A person in failing circumstances may assign a bill of lading of goods not yet arrived and not paid for, to another in trust, to apply the proceeds to the satisfaction of the vendor, and such assignment is good as against an attachment of another creditor. *Le Cacheux v. Cutter*, 6 Cal. 514.

A gift from husband to wife, when he is solvent, the gift not being otherwise unreasonable, will be upheld in an action by the wife to recover the property from an execution creditor of the husband who has bought the same at execution sale. *Morgan v. Hecker*, 74 Cal. 540.

That an insolvent debtor may, when there is no bankrupt or insolvent law making a different disposition of his property, lawfully devote it to the payment of any creditor, or a part of his creditors to the exclusion of others, is thoroughly settled by numerous well considered decisions. And while it is true that in this state under section 55 of the Insolvency Act of 1880, a conveyance made and accepted with such an intent, may be set aside by an assignee in insolvency proceedings instituted by or against the grantor, still, subject to the right thus given the assignee in insolvency to defeat it, such a conveyance is unassailable. *Priest v. Brown*, 100 Cal. 627, 631.

The following are from the syllabus to *Forbes v. Scannell*, 13 Cal. 243.

Personal property beyond the limits of this state, assigned in trust to pay the creditors of the assignor, the assignor and assignee both residing, and being at the time in the foreign jurisdiction where the property was, and possession being taken by the latter, vests in the assignee according to the *lex loci*; and his title will be maintained here against execution creditors of the assignor.

Such an assignment is not void as contravening the 39th section of the Insolvent Act of 1852.

Assignments of personal property in China, made there between citizens of the United States resident there, will be tested by the common law.

An alien friend may sue an American in the consular courts in China, established under the treaty of 1844, and the assignee of personal property assigned there in trust for foreign creditors, among others, may be compelled by such courts to execute the trust.

The decision of the consul as to the validity of the assignment, is not conclusive in the courts of this state.

An assignment of personal property in trust for creditors, need not be delivered as a deed. The making of the trust and its acceptance are sufficient, especially if accompanied or followed by possession of the property.

In such assignments, where no conditions are imposed on the creditors their acceptance is presumed.

Where the assignment embraces the property of the firm and of one member of the firm, in trust to pay his debts and the debts of the firm, it must be construed so as to give individual property to individual creditors, and firm property to firm creditors.

An assignment for the benefit of each and all the creditors of the firm, is sufficiently specific. Such trust, under the law, imposes well defined duties, such as to convert the property into money and pay over the proceeds, etc.

After the assignee of property in trust for creditors takes possession, the title and trust become fixed and executed, and the assignment is not revocable.

An assignment in trust for creditors to two firms jointly, by the firm names simply, is good, and the acceptance of the trust by one of the trustees is sufficient.

The want of a schedule of the property in such case, though



sometimes regarded as a circumstance of fraud, will not of itself, avoid the assignment.

One partner of a firm, expressly, or by implication, sole manager, his copartners being absent at a great distance, may assign the firm property in trust for creditors, if the assignment be necessary for their protection.

That the trustees employ the partner assigning, to aid them in winding up the concern, and pay him, and allow his wife some furniture, etc., is not proof of fraud in the assignment, there being no evidence that these benefits were promised at the time of the assignment. See sub. 4, Sec. 2457 Cal. C. C.

The Insolvency Act of Idaho contained a clause like section 39 of the Insolvency Act of California of 1852, to the effect that all assignments for the benefit of creditors, except those made in pursuance of the provisions of that Act should be void. Such provision necessarily forbade the common law assignment with preference. A debtor in Utah made an assignment with preferences which was not forbidden by the laws of that territory. The consummation of the assignment included the delivery of certain property of the debtor situated in Idaho. After the delivery of possession of the Idaho property to the assignee, a creditor in Michigan, caused an attachment to be levied on the Idaho property, in possession of the assignee in an action against the assignor.

On appeal to the United States Supreme Court, it is said concerning the Idaho statute: "Nothing is clearer from its various provisions than that the statute has reference only to domestic insolvents. \* \* \* The legislature of Idaho certainly did not attempt to discharge citizens of other jurisdictions from their liabilities, nor intend that personal property in Idaho belonging to citizens of other states or territories could not be applied to the payment of their debts unless they acquired a six month's residence in some county in Idaho, and went through its insolvency court."

Quoting from *Cole v. Cunningham*, 133 U. S. 107, the court also says: "Great contrariety of state decisions exists upon this general topic, and it may be fairly stated that, as between citizens of the state of the forum, and the assignee appointed under the laws of another state, the claim of the former will be held superior to that of the latter by the courts of the former; while, as between the assignee and citizens of his own state and the state of the debtor, the laws of such state will ordinarily be applied in the state of the litigation, unless forbidden by, or inconsistent with

the laws or policy of the latter. Again, although, in some of the states the fact that the assignee claims under a decree of a court or by virtue of the law of the state of the domicile of the debtor and the attaching creditor, and not under a conveyance by the insolvent, is regarded as immaterial; yet, in most, the distinction between involuntary transfers of property, such as work by operation of law, as foreign bankrupt and insolvent laws, and a voluntary conveyance is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation out of the state in which the law was passed. This is a reason which applies to citizens of the actual *situs* of the property when that is elsewhere than at the domicile of the insolvent, and the controversy has chiefly been as to whether property so situated can pass, even by a voluntary conveyance." And the court *Held*, that while the Idaho statute required a *pro rata* distribution of an insolvent's estate, without preference, yet no just rule required the courts of Idaho, at the instance of the citizen of another state, to adjudge a transfer, valid at common law, and by the law of the place where it was made, to be invalid because it preferred creditors elsewhere, and that the Idaho statute was not incompatible with the law of the domicile of the assignor. Hence the right of the assignee in possession was superior to the right of the Michigan attaching creditor. Citing and reviewing numerous cases. *Barnett v Kinney*, 147 U. S. 476; Law Ed. 37, 247.

Where the assignment is made *by* a citizen of the state, it is governed by the law of that state, whether the assignment is made *to* a citizen of the same state or of another state. *Brown v. Smart*, 145 U. S. 454; Law Ed. 36, 773.

SECTION 3452. An assignment for the benefit of creditors may provide for any subsisting liability of the assignor which he might lawfully pay, whether absolute or contingent.

See *LeCacheux v. Cutler* 6 Cal. 514; *Priest v. Brown*, 100 *id.* 631 and notes under sections 3432, 3441, 3442, *ante*.

Sections 3453 to 3456, inclusive, of the original Code provided for certain preferences as to one or more creditors or classes of creditors, but these sections were repealed immediately after the adoption of the codes, the repeal taking effect July 1, 1874.

SECTION 3457. An assignment for the benefit of creditors is void against any creditor of the assignor not assenting thereto, in the following cases:

1. If it give a preference of one debt or class of debts over another.
2. If it tend to coerce any creditor to release or compromise his demand.

3. If it provide for the payment of any claim known to the assignor to be false or fraudulent or for the payment of more upon any claim, than is known to be justly due from the assignor.

4. If it reserve any interest in the assigned property, or in any part thereof to the assignor or for his benefit before all his existing debts are paid.

5. If it confer upon the assignee any power which, if exercised might prevent or delay the immediate conversion of the assigned property, to the purposes of the trust.

6. If it exempt him from liability for neglect of duty or misconduct. (*In effect July 1st, 1874.*)

This section also was amended, in 1874, the amendment taking effect July 1st. The first paragraph of the original section read, "If it gives an *unlawful* preference of one debt or class of debts over another," thus recognizing the preferences provided for by the original sections 3453 to 3456 repealed at the same session. The other changes are not material to be noted.

No other interest or estate can be reserved to the assignor for the benefit of creditors, than that of a reconveyance or return of any residue remaining undisposed of after the creditors are satisfied. (Sec. 864 and Sub. 4, Sec. 3457 C. C.) *Wilhoit v. Cunningham*, 87 Cal. 453.

The section was considered in *Beardsley v. Frame*, 85 Cal. 134, where the assignment provided that the assignee shall run the saw and stave mill belonging to the assignor and saw lumber and staves, employing men, and selling the products, etc., but the decision of the court is not rested upon the invalidity of the assignment.

SECTION 3458. An assignment for the benefit of creditors must be in writing, subscribed by the assignor, or by his agent thereto authorized in writing, and the transfer by the sheriff must also be in writing, subscribed by the sheriff in his official capacity. Both such assignment and such transfer must be acknowledged, or proved and certified, in the mode prescribed by the chapter on recording transfers of real property, and be recorded as required by sections thirty-four hundred and sixty-three and thirty-four hundred and sixty-four; but recording in one county constitutes a compliance with the following section. (*In effect March 7, 1889, Stats. p. 82.*)

The original section was the same excepting that the sheriff has been inserted in order to carry out the provisions of 3449 as amended. As to the necessity of recording the instrument of assignment see notes under section 3459, *infra*.

SECTION 3459. Unless the provisions of the last section are complied with, an assignment for the benefit of creditors is void against every creditor of the assignor, not assenting thereto.

Under section 3465, which declares an assignment for the benefit of creditors void as against non-assenting creditors unless

recorded as acquired by sections 3463, 3464, it was held that no preliminary suit by such creditor was necessary to set aside the assignment before instituting a creditor's bill to apply the debtor's property in the assignee's hands upon an unsatisfied judgment against the assignor, and that where the instrument of assignment had been recorded in "miscellaneous" records it did not impart notice. Sections 1170 and 1213 C. C. should be construed together, and such recording of an instrument affecting real property was not recording "according to law." *Watkins v. Wilhoit*, 35 Pac. Rep. 646. But on rehearing it was said: "An assignment of real property for the benefit of creditors ought to be subject to these provisions as much as any other transfer of real property, because it is as much within the policy of the statute as any other transfer of such property. Subsequent purchasers and mortgagees are entitled to the same notice in one case as in the other, and have a right to rely on the same means of knowledge as to the true state of the title when parting with value on the faith of the apparent ownership. But with respect to creditors of the assignor who do not part with anything the case is totally different and they are not within the policy of these provisions. A transfer may be valid as to them although void as to subsequent purchasers in good faith and for value. To determine the validity of an assignment for the benefit of creditors, we look to the title 'On Assignments for the benefit of creditors,' (C. C. sections 3449 *et seq.*) \* \* \* neither of which require transcription into any book of records in order to effect a complete transfer of the property to the assignee as against creditors. The object of recording, so far as they are concerned, seems to be to make the assignment public and irrevocable, and when that object is accomplished the creditors are fully protected." *Watkins v. Wilhoit*, 38 Pac. Rep. 53.

In *Wilhoit v. Lyons*, 98 Cal. 409, the matter of recording this same assignment was considered, and after referring to the several sections of the statute, and the fact that the creditor in that case was not shown to have been a creditor at the time of the assignment, it was held that at most the deed was only made void as against creditors who were such at the time the assignment was made, and who did not assent thereto; and that those subsequently becoming creditors were not permitted to object, and that this creditor was not in the position of a purchaser in good faith, etc.

There may be a question as to the effect of a total failure to record an assignment, upon a creditor who was such at the time

of the assignment, and who refused to assent thereto or receive any benefit thereunder, although such question appears to be settled by the opinion in 38 Pac. Rep. 53, *supra*, if the instrument is in fact deposited with the recorder for recording. Nothing is said in the later opinion against the proposition stated in commissioner's decision of *Watkins v. Wilhoit* that a creditor against whom an assignment is void will not be put to a bill to set aside the assignment before subjecting the property to the satisfaction of his judgment, and an assignment may be void as to creditors for other reasons than failure to record, as, for instance, failure to mention credits or property in the inventory. (Sec. 3465.) *Beardsley v. Frame*, 85 Cal. 134. And see also section 3457.

SECTION 3460. An assignee for the benefit of creditors is not to be regarded as a purchaser for value, and has no greater rights than his assignor had, in respect to things in action transferred by the assignment.

A debtor making assignment for the benefit of creditors could turn over to the assignee thereby for the benefit of his creditors as much or little of his property as he pleased. It is true the code required him to make a full and true inventory of all of his property, whether or not exempt from execution, and if he failed to do so, the right of his creditors to proceed against him was in no way impaired. But neither the assignees nor creditors could claim any property, *under the assignment*, which was not in fact deeded to them. *Wilhoit v. Bryant*, 78 Cal. 263.

An assignee for the benefit of creditors may maintain an action for the cancellation of a note fraudulently given by his assignor. Injunction will lie to forbid the transfer of such note before maturity. *Ingram v. Smith*, 83 Cal. 234.

The case of *Ingram v. Smith*, 83 Cal. 234, is criticised in *Francisco v. Aguirre*, 94 Cal. 186, and the language employed to the effect that the note there under consideration was "void against all of Smiley's creditors, and also the plaintiff (the assignee of Smiley) upon whom the estate of Smiley devolved for the benefit of the creditors," was dictum, and that the case is to be distinguished because there the assignee was in possession and had the right to institute a suit to cancel a fraudulent note in defense of the rights of creditors. And it is further held that the statute does not give power to the assignee for the benefit of creditors to sue for or recover property alleged to have been transferred by the assignor in fraud of his creditors, and he has no such power unless it is given by statute.

*Held*, further, that an assignee for the benefit of creditors is not a person upon whom the assignor's estate has devolved for the

benefit of others than himself. An estate "devolves" upon another when, by operation of law, and without any voluntary act of the previous owner, it passes from one person to another; but it does not devolve *from* one person to another as the result of some positive act or agreement between them.

*Held*, further, that the assignee of a debtor, for the benefit of creditors, takes the property just in the condition and subject to the burdens existing at the time of the transfer, and that the assignee is not entitled to maintain suits for the benefit of creditors to set aside conveyances or incumbrances made by his assignor in fraud of creditors, was clearly the rule at common law, and it is held to be the rule in California. Our statute does not authorize such suits. (A rehearing was denied in this case, but Justice Paterson dissenting holds that the theory of our statute is in derogation of the common law rule, that the assignee becomes the trustee of the creditors, and that he should be construed to have power to institute such suits. His reasoning and authorities cited are worthy of consideration. Dissenting opinion, 94 Cal. p. 187.)

SECTION 3461. Within twenty days after an assignment is made for the benefit of creditors, the assignor must make and file in the manner prescribed by section 3463, a full and true inventory showing:

1. All creditors of the assignor;
2. The place of residence of each creditor, if known to the assignor; or if not known, the fact must be stated;
3. The sum owing to each creditor and the nature of each debt or liability, whether arising on written security, account or otherwise;
4. The true consideration of the liability in each case and the place where it arose;
5. Every existing judgment, mortgage or other security for the payment of any debt or liability of the assignor;
6. All property of the assignor at the date of the assignment, which is exempt by law from execution;
7. All of the assignor's property at the date of the assignment, both real and personal, of every kind, not so exempt, and the incumbrances existing thereon, and all vouchers and securities relating thereto, and the value of such property according to the best of the knowledge of the assignor.

A voluntary assignment for the benefit of creditors may include a claim against the United States, and is not affected by section 3477 Rev. Stats., forbidding transfers of claims against the government. *Goodman v. Niblack*, 102 U. S. 556; Law Ed. 26, 229; see also *Mayer v. White*, 24 How. U. S. 317; Law Ed. 16, 657.

The assignment is void if the assignor fraudulently omits

from the inventory some of his debts and property. *Beardsley v. Frame*, 85 Cal. 134.

In an action by the assignee it was held that the complaint was not subject to demurrer on the ground of want of capacity of plaintiff to sue merely because the complaint did not specifically allege the making of the affidavit which seems essential to the validity of the assignment. If the affidavit was not made the objection should have been set up by answer. *Wilhoit v. Cunningham*, 87 Cal. 459.

Where the assignee fails to give the bond or file the inventory and affidavit, the assignment passes the title, but the assignee has no authority until the required inventory, affidavit and bond are made and filed. *Bryant v. Langford*, 80 Cal. 543.

The code requires the assignor to make a full and true inventory of all his property whether exempt or not from execution, and if he fails to do so the rights of creditors to proceed against him are in no way impaired. But neither the assignee nor the creditors can claim under the assignment any property not in fact conveyed by it. And where the assignment excepts property as a homestead describing it as exempt, no interest therein passed to the assignee or creditors. It will not be assumed that such property was worth more than five thousand dollars because its value two years thereafter is alleged to be eleven thousand dollars. *Wilhoit v. Bryant*, 78 Cal. 263.

SECTION 3462. An affidavit must be made by every assignor executing an assignment for the benefit of creditors, to be annexed to and filed with the inventory mentioned in the last section, to the effect that the same is in all respects just and true according to the best of such assignor's knowledge and belief. If the assignor neglects or refuses to make and file such inventory and affidavit within said twenty days, the assignment shall not, for that reason, be affected in any way, but in that event the assignee or assignees elected by the creditors shall within twenty days thereafter make and file in the office of the county recorder where the assignment is first recorded, a verified inventory of all assets received by them; and such assignee or assignees may at any time, or from time to time, after the transfer to them by the sheriff, by petition to the Superior Court of the county or city and county where the assignment is first recorded, cause the assignor, by order or citation to appear before said court, or a commissioner or referee to be appointed by it, at a time and place within the county, or city and county, to be designated in the order or citation, to be examined touching the matters mentioned in section three thousand four hundred and sixty-one, and any other matters relative to the assignment, and to have with him all books of account, vouchers, and papers relating to the assigned property; and such court may by its order require the surrender to such assignee or assignees of such books, vouchers, and papers, to be by them retained until their trust is fully completed and performed. [*In effect March 7, 1889, Stats. p. 82.*]

Following was the original section. "An affidavit must be made by every person executing an assignment for the benefit of creditors, to be annexed to and filed with the inventory mentioned in the last section, to the effect that the same is in all respects just and true, according to the best of such assignor's knowledge and belief."

Mistakes in an assignment for the benefit of creditors whereby debts due are represented as more than is actually due will not vitiate the assignment when the error is not intentional or fraudulent. *Barroilhet v. Fisch*, 63 Cal. 462.

Under sections 3461, 3465 Civil Code Cal., when the inventory filed with an assignment omits debts due from the assignor and also omits portions of his property, such omissions are material and when not made in good faith they avoid the assignment. *Beardsley v. Frame*, 85 Cal. 134.

In an action by an assignee to restrain a sheriff from selling part of the assigned property the complaint was demurred to on the ground that the plaintiff had not legal capacity to sue because it did not appear from the complaint that the instrument of assignment was sworn to. *Held*, not a ground of demurrer. The want of capacity must appear affirmatively from the face of the complaint, otherwise the objection must be taken by answer. *Wilhoit v. Cunningham*, 87 Cal. 459.

And as to demurrer where it appeared that the instrument of assignment had not been recorded in the proper book, see note under section 3463. *Watkins v. Wilhoit*, 38 Pac. Rep. 53.

As to sufficiency of an information for perjury in swearing falsely to the inventory, see *People v. Naylor*, 82 Cal. 608.

SECTION 3463. An assignment for the benefit of creditors must be recorded and the inventory required by section 3461 filed with the county recorder of the county in which the assignor resided at the date of the assignment; or if he did not then reside in this state, with the recorder of the county in which his principal place of business was then situated; or, if he had not then a residence or place of business in this state, with the recorder of the county in which the principal part of the assigned property was then situated.

As to necessity for recording, and the giving of bond, and the invalidity of the assignment for failure in these particulars, see *Wilhoit v. Lyons*, 98 Cal. 409 and *Watkins v. Wilhoit*, 38 Pac. Rep. 53, cited under section 3459, and notes under 3461 *ante*.

See section 3464 where there are more than one assignors.

SECTION 3464. If an assignment for the benefit of creditors is executed by more than one assignor, it may be recorded and a copy of the inventory, required by section 3461, may be filed with the recorder of the county



in which any of the assignors resided at its date, or in which any of them, not then residing in this state, had then a place of business.

See sections 3461-2, and notes.

SECTION 3465. An assignment for the benefit of creditors is void against creditors of the assignor and against purchasers and incumbrancers in good faith and for value unless it is recorded as provided in this title, and unless either the inventory required by section three thousand four hundred and sixty-one, or the inventory required of the assignee or assignees by section three thousand four hundred and sixty-two is filed in the manner provided in this title and within the time designated. [*In effect March 7, 1889. Stats. p. 83.*]

Section 3462 as amended in 1889, provides that the assignment shall not be void by reason of the failure or neglect of the assignor to file the inventory, but that upon such failure the assignee selected by the creditors shall make such inventory.

This section was amended in 1878 by correcting a clerical error in the use of the word "not." As thus amended the section read as follows: "An assignment for the benefit of creditors is void against creditors of the assignor, and against purchasers and incumbrancers in good faith and for value, unless it is recorded, and unless the inventory required by section 3461 is filed, pursuant to section 3463, within twenty days after the assignment."

The assignment is void if the assignor fraudulantly omits some of his debts and property from the inventory. *Beardsley v. Frame*, 85 Cal. 134.

The statute makes the assignment void only as against creditors who were such at the time of the assignment and not as against those who subsequently became such. *Wilhoit v. Lyons*, 98 Cal. 412.

The code having declared an unrecorded assignment void as against non-assenting creditors, it is not necessary that such non-assenting creditors should first bring suit to set aside the assignment, before filing a creditor's bill to subject the property in the hands of the assignee to the satisfaction of his judgment against the assignor. *Watkins v. Wilhoit*, 35 Pac. Rep. 646. (Cal.) But see decision in this case on rehearing. 38 Pac. Rep. 53, and see *Wilhoit v. Cunningham*, 87 Cal. 453-460.

SECTION 3466. Where an assignment for the benefit of creditors embraces real property, it is subject to the provisions of article IV, of the chapter on Recording Transfers, as well as to those of this title. See sections 1158, 1217, O. C.

In *Watkins v. Wilhoit* on rehearing, 38 Pac. Rep. 53, it is said: "An assignment of real property for the benefit of creditors ought to be subject to these provisions as much as any other

transfer of real property, because it is as much within the policy of the statute as any other transfer of such property. Subsequent purchasers and mortgagees are entitled to the same notice in one case as in the other, and have a right to rely on the same means of knowledge as to the true state of the title when parting with value on the faith of the apparent ownership. But with respect to creditors of the assignor who do not part with anything, the case is totally different, and they are not within the policy of these provisions. A transfer may be valid as to them, although void as to subsequent purchasers in good faith and for value. To determine the validity of an assignment for the benefit of creditors, we look to the title 'On Assignments for the Benefit of Creditors.' (C. C. Secs. 3449, *et seq.*) \* \* \* Neither of which require transcription into any book of records in order to effect a complete transfer of the property to the assignee as against creditors. The object of recording, so far as they are concerned, seems to be to make the assignment public and irrevocable, and when that object is accomplished the creditors are fully protected." See notes under section 3459, *ante*.

SECTION 3467. No bond shall be given by the sheriff, but he shall be liable on his official bond for the care and custody of the property while in his possession. Within forty days after date of the transfer by the sheriff, the assignee must enter into a bond to the people of this state in such amount as may be fixed by a judge of the Superior Court of the county, or city and county, in which an inventory in accordance with the provisions of this title is filed, with sufficient sureties to be approved by such judge, and conditioned for the faithful discharge of the trust and the due accounting for all moneys received by the assignee, which bond must be filed in the same office with the inventory; and any assignee failing to comply with the provisions of this section may be removed by the above named Superior Court on petition of the assignor or any creditor, and his successor appointed by such court. [*In effect March 7, 1889. Stats. p. 83.*]

This section was amended in 1883 by substituting "Judge of the Superior Court," for "County Judge." As thus amended, the section required the bond to be given within "thirty" days after the date of the assignment, and did not contain the last clause of the present amendment relating to removal of the assignee for failure to file the bond.

In an action by the assignor to set aside a deed of assignment made by him upon the ground that the assignee had not given the required bond, it was held that the execution and delivery of the deed vested the property in the assignee. The failure to record the deed, or to give the bond, renders the assignment void as against creditors and against purchasers and incumbrancers in good faith and for value, but as to the assignor the conveyance is

irrevocable, and the remedy of the assignor is to have the assignee removed. *Bryant v. Langford*, 80 Cal. 543.

SECTION 3468. Until a verified inventory has been made and filed, either by the assignor or assignee, as required by the provisions of this title, and the assignee has given the bond required by the last section, such assignee has no authority to dispose of the property of the estate, or any part of it (except in the case of perishable property, which in his discretion he may dispose of at any time, and receive the proceeds of sale thereof); nor has he power to convert the property, or the proceeds of any sale of perishable property, to the purposes of the trust. Within ten days after the filing of his bond, the assignee must commence the publication (and such publication shall continue at least once a week for four weeks) in some newspaper published in the county, or city and county, where the inventory is filed, of a notice to creditors of the assignor, stating the fact and date of the assignment, and requiring all persons having claims against the assignor to exhibit them, with the necessary vouchers, and verified by the oath of the creditor, to the assignee, at his place of residence or business, to be specified in the notice; and he shall also, within ten days after the first publication of said notice, mail a copy of such notice to each creditor whose name is given in the instrument of assignment, at the address therein given. After such notice is given, a copy thereof, with affidavit of due publication and mailing, must be filed with the county recorder with whom the inventory has been filed, which affidavit shall be *prima facie* evidence of the facts stated therein. At any time, or from time to time, after the expiration of thirty days from the first publication of said notice (*provided*, the same shall also have been mailed as in this section provided), the assignee may, in his discretion, declare and pay dividends to the creditors whose claims have been presented and allowed. No dividend already declared shall be disturbed by reason of claims being subsequently presented and allowed; but the creditor presenting such claim shall be entitled to a dividend equal to the per cent. already declared and paid before any further dividend is made; *provided, however*, that there be assets sufficient for that purpose; and *provided*, that the failure to present such claim shall not have resulted from his own neglect, and he shall attach to such claim a statement, under oath, showing fully why the same was not before presented.

When a creditor has a mortgage or pledge of real or personal property of the debtor, or a lien thereon, for securing the payment of a debt owing to him from the debtor, and shall not have conveyed, released, or delivered up such security to the sheriff, as provided for by section three thousand four hundred and forty-nine of this code, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such mortgage, pledge, or lien, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the Superior Court of the county in which the assignment is made shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the debtor's right of redemption therein on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon, and in either case the assignee and creditor, respectively, shall

execute all deeds and writings necessary or proper to consummate the transaction. If the property is not sold or released, and delivered up, the creditor shall not be allowed to prove any part of his debt. [*In effect sixty days from March 26, 1895.*]

The original section was as follows: "Until the inventory and affidavit required by sections 3461 and 3462 have been made and filed, and the assignee has given a bond, as required by the last section, the assignee for the benefit of creditors has no authority to dispose of the estate or convert it to the purposes of the trust." The section was amended in 1889, (Stats. p. 84) to read exactly as at present, except that the last clause, commencing, "When a creditor has a mortgage or pledge," etc., has been added by the amendment of 1895. This latter provision corresponds with section 44 of the Insolvency Act of 1880, and section 48 of the Act of 1895.

Where the assignees, under an assignment for the benefit of creditors fail to give the bond required, the assignment is not invalidated. The remedy of the assignor is to have the assignees removed. The title passes from the assignor to the assignees upon the complete execution of the assignment, but until the bond is given and the affidavit and inventory have been filed, the assignees have no authority to dispose of the estate. *Bryant v. Langford*, 80 Cal. 542.

SECTION 3469. After six months from the date of an assignment for the benefit of creditors, the assignee may be required, on the petition of any creditor to account before the Superior Court of the county where the accompanying inventory was filed, in the manner prescribed, by the insolvent laws of this state. [*In effect February 15, 1883.*]

The amendment of 1883 consisted in substituting "Superior" for "County" Court.

There is some difference in the provisions of the Insolvency Acts of 1880 and 1895, with reference to the accounting by assignees. Section 29 of the Act of 1880, required the assignee to exhibit his account to the court and creditors at the expiration of three months, and thereafter further accounts, statements and dividends shall be made in like manner as occasion requires. Under section 33 of the Act of 1895, at the expiration of three months, the court shall fix a time and place at which the assignee shall exhibit to the court and creditors his account. In both, this exhibit is accompanied by or consists in the filing of just and true accounts of all his receipts and payments, verified by his oath and a statement of the property outstanding, with the cause of its outstanding, etc. The Act of 1895 provides further that the court shall, at the hearing, audit the accounts, and that any person interested may appear and file exceptions and contest the

same. It also requires the assignee to file his final account within one year from the date of the order of adjudication, unless the court, after notice to creditors, shall grant further time upon a satisfactory showing, etc. Section 30 of the Act of 1880, and 34 of the Act of 1895, provide that the court shall, at any time, upon the motion of two or more creditors, require the assignee to file his account, and if he has funds subject to distribution he shall be required to distribute them without delay. The latter act adds that this shall only be upon giving the notice specified in the preceding section.

There does not seem to be occasion for any difficulty to arise from a question as to what "insolvency law" was contemplated in this section—whether it was intended to apply to subsequent amendments of the then existing law and future new acts, or only to the statutes then existing, since the control of the court over the assignee is necessarily great, and a compliance with the later act would in no way conflict with, though it may require more than the Act of 1880.

The court may require the assignee for benefit of creditors, to account as often as may seem advisable, and an order to account as provided in section 29 of Insolvent Act is not appealable. *Rosenthal v. Levy*, 73 Cal. 9.

SECTION 3470. Property exempt from execution, and insurance upon the life of the assignor, do not pass to the assignee, by a general assignment for the benefit of creditors, unless the instrument specially mentions them, and declares an intention that they should pass thereby.

Exempt property. Section 690 C. C. P. Homestead. Sections 1238 to 1263 C. C.

SECTION 3471. The elected assignee or assignees for the benefit of creditors shall be entitled to the same commissions on assignments heretofore and hereafter made as are allowed by law to the assignees in insolvency, and the assignment cannot grant more. Such assignee or assignees shall also be entitled to all necessary expenses in the management of their trust. [*In effect March 7, 1889, Stats. p. 84.*]

Under section 28 of the Act of 1880, and 32 of the Act of 1895, assignees are allowed seven per cent. upon the first thousand dollars; five per cent. above that up to ten thousand dollars and four per cent. on all above ten thousand. There is, however, added by the latter act the proviso that if the person acting as assignee was also a receiver of the property of the estate pending the election of an assignee, any compensation allowed him as such receiver shall be deducted from the compensation to which he otherwise would receive as such assignee.

The original section allowed "the same commissions as are

allowed by law to executors and guardians; but the assignment cannot grant more, and may restrict the commissions to a less amount or deny them altogether."

Where the assignment was silent as to the commissions to be allowed, and provided that all the estate should be distributed—*held*, an allowance of \$600 commissions was properly made. *Meuke v. Miller*, 56 Cal. 628.

SECTION 3472. An assignee for the benefit of creditors is not to be held liable for his acts, done in good faith, in the execution of the trust, merely for the reason that the assignment is afterward adjudged void.

Where the assignee for benefit of creditors, having received a valuable estate by the assignment, permitted his assignors to deal with the assigned property and to "pocket" the proceeds thereof, though he may have been innocent of any intended fraud, he is liable to the creditors for the loss. *Baker v. Bartol*, 6 Cal. 486; *Riddle v. Baker*, 13 *id.* 303.

The receiver is not liable to an action for conversion where he, as such receiver, and under the direction of the court, demands and receives property from a third party. *Tapscott v. Lyon*, 37 Pac. Rep. (Cal.) 225.

In an action against garnishees to recover money of the debtor in their hands, where it appears from the evidence of plaintiff that the defendants hold the money as assignees of the debtor for the benefit of creditors, a non-suit should be granted. The assignment should be first impeached before the court is authorized to disregard it as invalid. *Hecht v. Green*, 61 Cal. 269.

An assignee who fraudulently applies or misappropriates funds of the trust estate is guilty of embezzlement. *People v. De Lay*, 80 Cal. 52.

Where an attorney employed by an assignee compromises claims against the debtor at fifty cents on the dollar, giving his own notes in settlement, with the understanding that the estate is to pay them when due, he cannot, on failure of the estate to do so, and the estate proving to be solvent, have the claims assigned to a third person who advances the money to pay them, and then collect the full amount from the estate for the benefit of such third person. Where in such case the attorney is a law partner of the assignee, the latter will be chargeable with constructive notice of all the facts of the transaction coming to the knowledge of the former, and is liable for the excess paid out over the amount for which the attorney bought the claims, and where he employs counsel to defend unjust claims paid by him, he cannot, in case of defeat, have such counsel's fees allowed out of

the estate. *Suttleff v. Clunie*, 37 Pac. Rep. 225 (Cal.) Rehearing granted.

SECTION 3473. An assignment for the benefit of creditors which has been executed and recorded so as to transfer the property to the sheriff, or a transfer by the sheriff to the elected assignee or assignees which has been executed and recorded, cannot afterwards be modified or canceled by the parties without the consent of the assignor and of every creditor affected thereby. [*In effect March 7, 1889, Stats. p. 84.*]

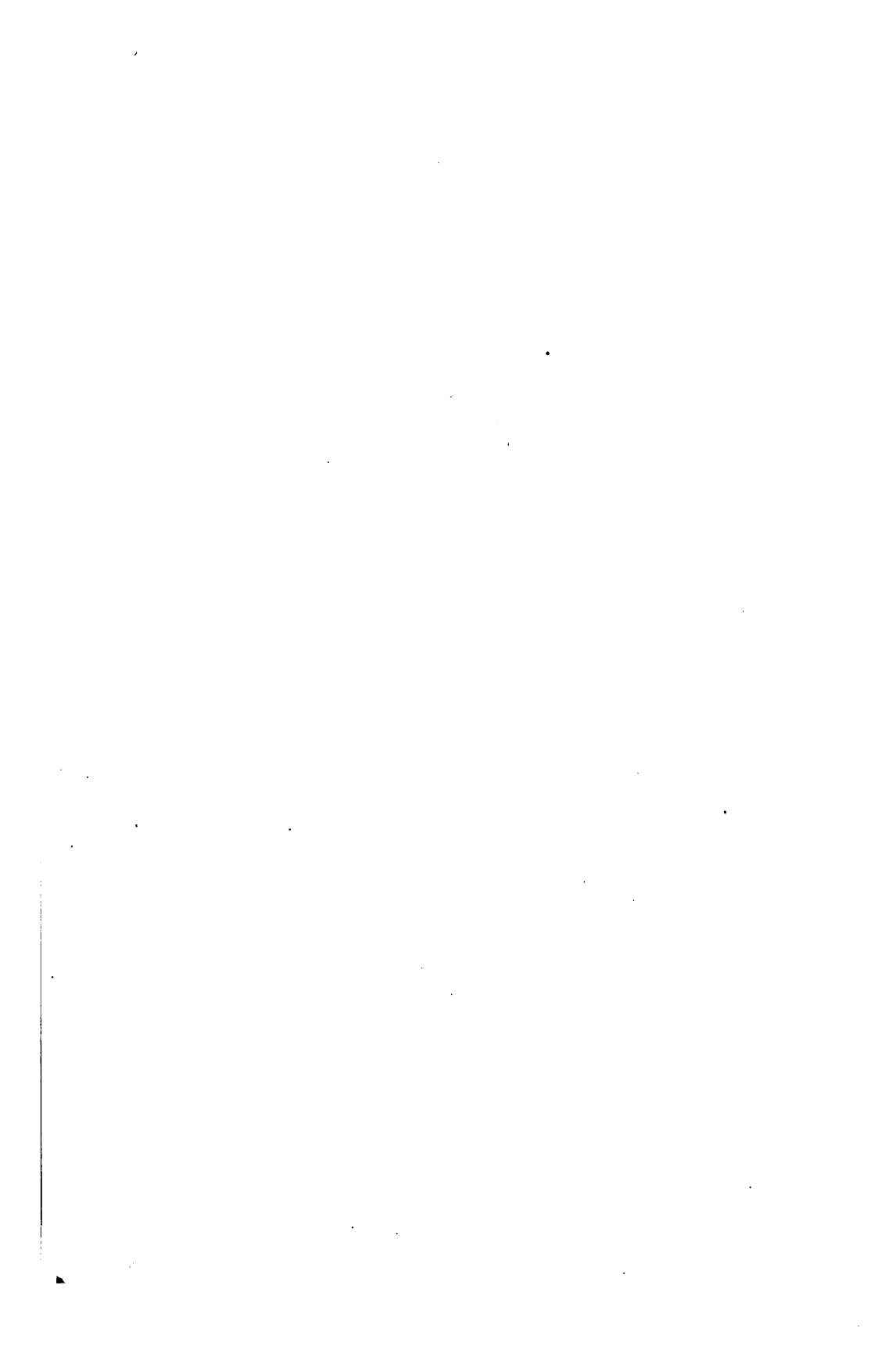
The original section was the same except that it had no reference to the assignment to the sheriff, or a transfer by the sheriff to the elected assignee or assignees.

An assignee becomes a trustee to carry out the objects of the assignment. *Connolly v. Peck*, 6 Cal. 349; *Lockwood v. Canfield*, 20 *id.* 126.

When the assignee has taken possession, the assignment becomes irrevocable. *Forbes v. Scannell*, 13 *id.* 288.

The assignee for the benefit of creditors has his remedy against a receiver, subsequently appointed in insolvency proceedings, and who takes property from the assignee, as a trespasser, but the assignee is not entitled to prohibition to restrain the receiver. *Haile v. Superior Court*, 78 Cal. 418.

A petition for writ of review, to the Supreme Court, to annul an order of the Superior Court removing a trustee who had previously been appointed in the place of a deceased assignee for the benefit of creditors, is insufficient unless it alleges that the order was made without notice to the person removed and that the petition for his removal did not charge that he was unfit for the office or had violated his duties. *Marsh v. Superior Court*, 88 Cal. 595.





# INSOLVENCY ACT OF 1895

## ARTICLE I.

### GENERAL SUBJECT OF THE ACT.

SECTION 1. Every insolvent debtor may, upon compliance with the provisions of this act, be discharged from his debts and liabilities. This act shall be known and may be cited as the Insolvent Act of eighteen hundred and ninety-five.

Proceedings in insolvency are purely statutory, and the court in exercising jurisdiction therein is limited by the statute. *Vermont Marble Co. v. Superior Court*, 99 Cal. 579.

The power conferred upon congress by section 8, article I of the federal constitution to pass uniform laws upon the subject of bankruptcies, is not exclusive so as to preclude the states from enacting insolvency laws, until congress exercises its power and enacts such bankruptcy legislation. When congress exercises its power the state insolvency laws are suspended so long as the congressional act remains in force, but proceedings already instituted in the state courts in insolvency may be prosecuted to completion. *Martin v. Berry*, 37 Cal. 208.

The operation of the state insolvent law was suspended while the United States bankruptcy law was in operation. Upon repeal of the bankruptcy law the state law became operative, and debts contracted during its suspension could be discharged in proceedings under it. *Smith v. His Creditors*, 59 Cal. 267, and cases there cited.

The legislature had authority to pass the supplementary Insolvency Act of 1876, while the United States Bankruptcy Act was in force, but its operation was suspended while the Bankruptcy Act remained in force. *Seattle Coal Co. v. Thomas*, 57 Cal. 197; *Lewis v. County Clerk*, 55 Cal. 604; *Boedefeld v. Reed*, *Id.* 299.

Under section 10, article I, U. S. constitution a state is prohibited from passing an insolvent act which would have the effect of discharging obligations arising under contracts made elsewhere, when the creditor in no wise participates in the insolvency proceedings. *Lowenberg v. Levine*, 93 Cal. 215.



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The Act of 1852 was construed strictly. *Meyer v. Kohlman*, 8 Cal. 44; *McAllister v. Strode*, 7 *id.* 428.

The Insolvent Act of 1880 did not repeal the provisions of the Civil Code relating to assignments for the benefit of creditors. *Barroilhet v. Fisch*, 63 Cal. 462.

The "relief" to the insolvent and the "protection" to the creditor proceed *pari passu*. If the debtor, for any cause is entitled to no relief, the creditors require no protection, for they are not deprived of the right to proceed under the general law for the collection of debts. *Sanborn v. His Creditors*, 37 Cal. 609.

The proceedings under the statute are not intended to be summary or hurried, but are, at least so far as the trial of opposition is concerned, to be conducted according to the course of the common law. Instead of its being necessary in the nature of the contest that judgment should be reached within a given interval, it is obvious that there is nothing to distinguish the controversy from litigation concerning property, or other personal interests at large. *People v. Roseborough*, 29 Cal. 417.

It was said that proceedings in insolvency were not *stricti juris* either proceedings in law or equity, but were simply statutory. That the act might be treated either as a bankrupt or insolvent law, or both, and that exemption from arrest upon mesne or final process and harassing litigation were parts of the relief thereby granted to insolvents. *Cohen v. Barrett*, 5 Cal. 195.

Insolvency proceedings are not proceedings merely for the collection of debts. Where a petition was filed by firm creditors, an answer setting up that the petitioning firms had not filed or published certificates of partnership was properly demurred to. The petition need contain only the facts required by section 8 of the Insolvent Act. The fact that a petitioning creditor has a provable debt is necessary to be shown for two purposes only. (1) to show that the alleged debt occupies that relation; (2) that the petitioner has the requisite qualification to commence the proceeding. A creditor who is authorized to join in a petition for involuntary insolvency is one whose demand is provable under that act. *In re Dennery*, 89 Cal. 101.

A proceeding in insolvency is not an *action* as defined by section 22 C. C. P., but is in the nature of a special proceeding and is included in section 23 of that code; and sections 2466, 2468 C. C. do not by express terms include special proceedings. *Harrison, J.* dissenting, points out that a member of one of the petitioning firms in involuntary proceedings was a non-resident

of the state and that therefore the petition did not confer jurisdiction. The petitioners must be residents of the state. *Id.*

*United States Supreme Court Decisions.*

It was held in *Sturges v. Crowninshield*, 4 Wheat. U. S. 122; Law Ed. 4, 529, and *F. & M. Bank v. Smith*, 6 Wheat. 135; Law Ed. 5, 225, that so far as a state insolvent law attempts to discharge an indebtedness created prior to its passage, it was unconstitutional as impairing the obligation of a contract, but that this objection did not exist where such law discharged the person of the debtor and his future acquisition of property against debts contracted subsequent to the passage of the law. *Ogden v. Saunders*, and *Boyle v. Zacharie*, *infra*.

The power of congress to establish uniform laws on the subject of bankruptcy does not exclude the right of the states to legislate on the same subject, except when the power is actually exercised by congress and the state laws conflict with those of congress. *Sturges v. Crowninshield*, 4 Wheat. U. S. 122; Law Ed. 4, 529; *Ogden v. Saunders*, 4 *id.* 213; Law Ed. 6, 606; *Boyle v. Zacharie*, 6 Pet. 348; Law Ed. 8, 423.

And so proceedings in bankruptcy did not divest the state court of jurisdiction in a foreclosure suit, nor to the prosecution in the name of the bankrupt of a suit commenced. *Thatcher v. Rockwell*, 105 U. S. 467; Law Ed. 26, 949; *Eyster v. Gaff*, 91 U. S. 521; Law Ed. 23, 403.

The repeal of the Bankruptcy Act removed an obstacle to the state insolvency law, and did not render it necessary to re-enact the state law. *Butler v. Gorely*, 146 U. S. 303; Law Ed. 36, 981.

A state insolvent law is invalid, though enacted while a national bankrupt act is in force, and on the repeal of the latter it becomes operative. *Tua v. Carriere*, 117 U. S. 201; Law Ed. 29, 855.

*Jurisdiction.*

The court acquires jurisdiction by the filing of the petition, and its further proceedings under the act cannot be enjoined in proceedings for dissolution of a corporation subsequently instituted under section 601, Political Code. *State I & I Co., v. San Francisco*, 101 Cal. 135.

The jurisdiction of the court attaches to make such orders as precede the publication of notice to creditors from the filing of the petition and schedule, but its jurisdiction to discharge the insolvent is further dependent upon the due notice to creditors. This is especially so unless all the creditors appear on the day fixed for the meeting. (Citing *McDonald v. Katz*, 31 Cal. 167; *Langenour v. French*, 84 *id.* 92; *Flint v. Wilson* 36 *id.* 24.) *Cerf v. Oaks*, 59 Cal. 132.

The insolvency court has jurisdiction to order property or its proceeds to be restored by the receiver, where he has taken it from others under claim that it belonged to the insolvent's estate, notwithstanding his taking it was consented to by the rightful owners, they at the time not waiving but reserving their rights, and notwithstanding it had been ordered sold by the court as perishable. *Hulme et al v. Superior Court*, 63 Cal. 239.

In a case on petition of creditors where the court orders the debtor to show cause on a day why he should not be adjudged an insolvent and the person appears with his attorney, the court has jurisdiction to adjudge him an insolvent without waiting for a meeting of creditors. *Lyon v. Crosby*, 64 Cal. 34.

The remedy afforded creditors under the Insolvent Act are not exclusive, and a court of equity has jurisdiction to require the assignee of an insolvent estate to perform his trust and account for the property assigned to him. *Sanderson v. McIntosh*, 65 Cal. 36.

The court acquires jurisdiction in involuntary insolvency upon the filing of the petition properly signed and verified and service of copy thereof with copy of the order to show cause upon the debtor, and errors thereafter committed in the course of the proceedings do not render its judgment or orders liable to collateral attack. *Luhrs v. Kelly*, 67 Cal. 289.

A court of equity has no jurisdiction to set aside proceedings in insolvency at the suit of creditors upon allegations of fraud; the creditors have an opportunity to oppose the discharge of the debtor. *Pehrson v. Hewitt*, 79 Cal. 594.

The record in insolvency proceedings must show substantial compliance with the provisions of the act. Every intendment may be indulged in favor of the proceedings not inconsistent with the record, but this does not dispense with the necessity of compliance with the provisions of the act, since it is the act which creates the right or privilege sought in the proceedings under it. An adjudication and order staying proceedings made two days before the petition was filed and one day before being presented to the judge, are void for want of jurisdiction. (*Hahn v. Kelly*, 34 Cal. 39, explained; *McDonald v. Katz*, 31 *id.* 167, approved;) *Hastings v. Cunningham*, 39 Cal. 137.

The jurisdictional facts in proceedings in insolvency are, a petition setting forth substantially such a state of facts as will bring the case within the provisions of the statute, and due publication of notice to creditors. In a collateral attack upon a judgment discharging a debtor "from all his debts, whether imperfectly described or not described at all, which were contracted

before the surrender of his estate," no inquiry can be entertained except as to the jurisdiction of the court rendering it. *Friedlander v. Loucks*, 34 Cal. 18.

In case of collateral attack—*held*, by the filing of the petition containing the statement of facts prescribed in sections 2 and 3 (Stats. 1852) and the schedules duly subscribed and verified, and by making the proper order and giving the proper notice, the court acquires jurisdiction of the subject matter and the parties. From thence the question relates to procedure within the jurisdiction. *Langenour v. French*, 34 Cal. 92.

In *McDonald v. Katz*, 31 Cal. 167, it was said that proceedings in insolvency are special and no intendments can be indulged in favor of the jurisdiction. As to the publication of notice for creditors to show cause, it was held that where the first publication was not at least thirty days before the day fixed for the creditors to appear, a discharge granted in default of opposition was void on collateral attack. The proofs showed that the first publication was January 31, and the day for appearance was February 28, following.

In involuntary proceedings it is not necessary to serve the notice on the moving creditors. Jurisdiction to appoint an assignee is acquired by the notice to the debtor. *Ohleyer v. Bunce*, 65 Cal. 544.

That insolvency proceedings were held to be special and that everything in support of the jurisdiction must appear affirmatively, see *Hastings v. Cunningham*, 39 Cal. 142; *Dorsey v. Barry*, 24 *id.* 449; *Swain v. Chase*, 12 *id.* 238; *Judson v. Atwill*, 9 *id.* 478; *Meyer v. Kohlman*, 8 *id.* 47; *McAllister v. Strode*, 7 *id.* 430.

Where it is apparent on the record that the County Court had no jurisdiction of the insolvency proceedings, its judgment of discharge is void, and the creditor is entitled to pursue the ordinary remedies for enforcing his demand. *Sturgis v. Shepard*, 28 Cal. 115.

The insolvency court does not lose its jurisdiction of the subject matter by settling the accounts of the assignee and discharging him. The subject matter being the estate of the insolvent and its proper distribution among the creditors, the court will resume its jurisdiction when additional estate is discovered after the discharge of the assignee, and will entertain the suit of the assignee to recover the same. *Rued v. Cooper*, 34 Pac. Rep. 98, (Cal.)

Under the statute prior to 1880, the petition and schedule were required to be sworn to before the judge of the court to which the

petition was addressed, and it was held that where the oath was taken before a notary public instead of the judge, the court did not acquire jurisdiction. *Baker v. Everhart*, 65 Cal. 27.

## ARTICLE II.

### VOLUNTARY INSOLVENCY.

SECTION 2. An insolvent debtor, owing debts exceeding in amount the sum of three hundred dollars, may apply by petition to the Superior Court of the county, or city and county, in which he has resided for six months next preceding the filing of his petition, to be discharged from his debts and liabilities. In his petition he shall set forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain a discharge from his debts and liabilities, and shall annex thereto a schedule and inventory, and valuation, in compliance with the provisions of this Act. The filing of such petition shall be an act of insolvency, and thereupon such petitioner shall be adjudged an insolvent debtor.

This section is the same as section 2 of the Act of 1880, and is substantially the same as the corresponding section of the Bankruptcy Act. Section 5014, Rev. Stats.

#### *Insolvent Debtor.*

Whether a person is an insolvent debtor is the first question to be determined; whether proceedings are voluntary or involuntary. The following definitions of debtor and creditor are given in the Civil Code:

SECTION 3429. A debtor, within the meaning of this title, is one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability is certain or contingent.

SECTION 3430. A creditor, within the meaning of this title, is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money.

But it will also be observed that by section 3 of the present act the petitioner is required to give in his schedule an outline of the facts touching any liability, directly or indirectly in the nature of any right of action against him by any one, and by section 4, his inventory is required to contain an outline of the facts touching any right of action in his favor against any one. This new provision may be of some assistance in determining what should be set out in the petition and schedules in doubtful cases, but if it is meant that personal actions, such as do not survive or devolve upon the administrator should be placed in the schedules, there is reason to doubt the propriety of the provision. It will hardly be contended that the assignee is to take, or the insolvent to transfer, rights of action for slander or breach of promise of marriage, or personal injury to his wife or child, in



short, such rights as are not assignable. This subject is further discussed under section 22, *infra*.

The filing of the petition is itself an act of insolvency and the adjudication follows. There are no parties to the proceedings other than the insolvent himself at the time of the adjudication, or until a creditor makes proof of claim; and the order of the judge fixing a time for selecting an assignee is but a regulation of the order of business. At the selection of an assignee there is no judicial function required of the court. *Chinette v. Conkling*, 38 Pac. Rep. 1107.

A debtor is not insolvent within the meaning of the law, if he has sufficient resources or means to pay all his debts as they become due in the ordinary course of business, though he may not have sufficient money in hand or in bank to meet them or to pay a particular debt, *in money*, when due. A finding that the debtor was not insolvent at the time of making a transfer of property will be sustained where the evidence shows that he had property enough to pay all his debts and intended to pay them all and did not contemplate insolvency, though he was then under attachment for a small amount and did not have *money on hand* to pay all his debts then due. (*Beatty, C. J.*, and *Thornton, J.* dissenting.) *Sacry v. Lobree*, 84 Cal. 41.

When a debtor is unable to pay his debts from his own means as they become due, he is insolvent. *Washburn v. Huntington*, 78 Cal. 573.

A trader is insolvent when he is not in a condition to meet his engagements or pay his debts in the usual and ordinary course of business; but he is not so merely because his assets, at a given date, may not satisfy all the demands against him, due and to become due. *Bell v. Ellis*, 33 Cal. 620.

Evidence that a person when called on by different persons for payment of certain of his notes replied that he was not able to pay them, that he had tried to raise money and was unable to do so, will sustain an order adjudging him insolvent, without considering the existence of numerous attachments existing against him at the time of the adjudication. *Clarke v. Mott*, 33 Pac. Rep. 884. (Cal.)

An instruction "that a man who is insolvent from the want of means to pay his debts in this state is in law insolvent, without reference to any property in another state" is incorrect in stating an abstract proposition too broadly, and was properly refused also because there was no evidence of the insolvency of the party. *Thompson v. Paige*, 16 Cal. 78.

A party whose assets are forty per cent. above his liabilities cannot be said to be insolvent. *Hunt v. His Creditors*, 9 Cal. 46.

The Act of 1852 provided that if there be any creditors residing without the state the judge shall appoint a creditor to represent them. *Held*, where the insolvent's schedule showed a certain creditor to be a non-resident and there was no attorney appointed as prescribed by the statute, the subsequent proceedings were *coram non judice*, and void as to such creditor. *Hanscom v. Tower*, 17 Cal. 518.

*Six Months' Residence.*

As to residence see Cal. Pol. Code section 52, Const. Sec. 4, Art. 2, and *Stewart v. Keyser*, 38 Pac. Rep. p. 19, approving *People v. Holden*, 28 Cal. 137, from which it will appear that the fact of residence is established by proofs of the intention of the party.

The order of the court denying a motion to change the place of trial in involuntary proceedings on the ground of the residence of the defendant, will not be disturbed where there is conflicting evidence. *Creditors v. Welch*, 55 Cal. 469.

The fact of residence is jurisdictional. *Jolly v. Foltz*, 34 Cal. 321.

In divorce proceedings it is held that the complaint must aver six months residence in the county. *Bennett v. Bennett*, 28 Cal. 600.

Stopping at a place to reside for a limited time does not cause one to lose or acquire a residence. *Dow v. Q. & C. G. M. Co.*, 30 Cal. 629.

Where the petitioner states in his petition that he is and for about ten years last past has been a citizen of P. county, state of California, and has been mostly engaged in ranching and raising stock in said county, the petition substantially shows the jurisdictional fact of residence in that county for six months next preceding the filing of his petition. *Langenour v. French*, 34 Cal. 92.

Where an insolvent directed his petition to the district judge of the fourth judicial district, and the petition stated that he was a resident of the city of San Francisco, it was held that this averment was sufficient to show his residence was within the fourth judicial district. *Slade v. His Creditors*, 10 Cal. 483.

Under the act of 1852, it was held unnecessary for the petition in insolvency to allege that his debts were created in this state—such fact not being jurisdictional. *Sharp v. His Creditors*, 10 Cal. 418.

*The Petition Generally.*

A petition in involuntary insolvency is not fatally defective in

alleging that "A & B," doing business under the firm name of, etc., are indebted, instead of alleging that the firm, "A & B," is indebted—in either form it sufficiently appears that the partnership is indebted. *Wright v. Cohn*, 88 Cal. 328.

Where the debtor acted in good faith and upon advice of counsel in including certain property and a list of debts in his schedule, it is not sufficient objection to his discharge that the schedules were erroneous. *In re Bregard*, 84 Cal. 322.

It is the duty of the insolvent to include in his schedule and inventory all the property in which he has any interest, including partnership, and all debts upon which he is personally liable, including partnership debts, and if the partner has without his knowledge attempted to pay the partnership debts by transfer of partnership property, the including of such property and debts is not "false and fictitious." *Id.*

If an applicant for discharge in insolvency holds an office from which he derives a salary, his future salary or revenues do not constitute an estate "in expectancy," which he is required to surrender for the benefit of his creditors. *Grow v. His Creditors*, 31 Cal. 328.

The petition must be sufficient to support an adjudication in order that a transfer made within thirty days previous to the filing thereof can be declared void. A transfer made within thirty days prior to filing an insufficient petition will not be declared void under a subsequent sufficient amended petition filed more than thirty days subsequent to the transfer. *La Point v. Bulware*, 37 Pac. Rep. 929. (Cal.)

The filing of a petition to which a general demurrer is sustained for insufficiency, cannot be deemed the commencement of proceedings in insolvency. *Id.*

The petition stands in the place of a complaint, and the same objections, by way of demurrer, may be taken as to a pleading, and it may be amended if desired like other pleadings. *Bennett v. His Creditors*, 22 Cal. 441; *Wilson v. His Creditors*, 32 *id.* 406.

Under the Act of 1852 which required the petition to set forth losses sustained and to which his insolvent condition might be attributed, the failure of the petitioner, upon examination as a witness, to explain how the alleged losses occurred, raises an inference that the losses were not honestly made. *Schloss v. His Creditors*, 31 Cal. 201.

The petition need not aver that the debts were not created while acting in a fiduciary capacity. *Brewster v. Ludekins*, 19 Cal. 162.

It is the court that acquires jurisdiction of proceedings, and it is no objection that the insolvent's petition was addressed to the court instead of the judge. [The Acts of 1880 and of 1895 provide that the insolvent may apply by petition to the Superior Court.] *Brewster v. Ludekins*, 19 Cal. 162.

The petition may be signed by the attorney and not by the debtor, but it was thought the petition should be verified by him. Under the 33rd section of the Act of 1852 the application could not be made by any agent (but see *Wilson v. his Creditors*, 32 Cal. 406). Where the list of assets, losses and liabilities were all made out together and signed and verified by the petitioner, this was held sufficient as against collateral attack. *Id.*

It was held that the fact of the petitioner's residence in the county for six months next preceding the filing of his petition was not made jurisdictional. (Stats. 1852-3 p. 314, Sec. 2.) All that was required to be stated in the petition was the circumstances which compelled him to surrender his property, accompanied with a prayer expressive of his desire to make a cession of his estate, etc. The same section makes a six month's residence a condition precedent to his *right* to institute proceedings, and it may be better practice for the judge to require that this condition be made to appear by the petition, but that is not necessary to clothe the court with jurisdiction in the premises. and on collateral attack, the judgment of discharge by the county court, it being a court of record, will be sustained. Especially where the judgment of discharge recites that all requirements of the act have been complied with. On collateral attack, matters which should be proven in the course of proceedings will be presumed to have been proven. (Approving *Languenour v. French*, 34 Cal. 92; *Hahn v. Kelly*, *Id.* 391.) *Barnett v. Carney*, 33 Cal. 530.

*Hahn v. Kelly* is modified by the decision in *Belcher v. Chambers*, 53 Cal. 640, in so far as relates to the conclusive presumption in favor of the judgment of a state court of record.

And the recital in the judgment that certain acts or all acts necessary to give jurisdiction have been done, will not be sufficient against other matter in the record showing want of jurisdiction. *Weeks v. Gold Mining Co.*, 73 Cal. 599.

See notes under sections 11, 57, *infra*.

SECTION 3. Said schedule must contain a full and true statement of all his debts and liabilities, exhibiting to the best of his knowledge and belief, to whom said debts or liabilities are due, the place of residence of his creditors, and the sum due each; the nature of the indebtedness or demand, whether founded on written security, obligation, contract, or otherwise;

the true cause and consideration thereof, and the time and place, when and where said indebtedness accrued, and a statement of any existing pledge, lien, mortgage, judgment, or other security for the payment of the same; also an outline of the facts touching any liability, directly or indirectly, in the nature of any right of action against the insolvent by any one.

As the repealing clause of the present Act repeals absolutely all the provisions of the Act of 1880, and provides only for carrying forward and concluding proceedings commenced under the former Act, prior to the taking effect of this, it may be held that debts contracted prior to the taking effect of this Act will not be discharged under it. If this suggestion is correct there is no occasion for placing in the schedule any such debts, nor of instituting any proceedings with reference to such debts. See the note under "Discharge," Sec. 53, *post*.<sup>1</sup>

Prior to the amendment of 1895, the act did not specifically require an outline, or any statement of facts touching "any liability, directly or indirectly, in the nature of any right of action against the insolvent by any one." This provision is new.

SECTION 4. Said inventory must contain an accurate description of all the estate, both real and personal, of the petitioner, including his homestead, if any, and all property exempt by law from execution, and where the same is situated, and all incumbrances thereon; also an outline of the facts touching any right of action in favor of the insolvent against any one.

The clause "also an outline of the facts touching any right of action in favor of the insolvent against any one" is new, corresponding with the last clause of section 3.

These new provisions are manifestly a basis for the provisions in section 22, for suits to be prosecuted and defended by the assignee and of which notice is taken in the notes under that section.

#### *The Schedule.*

A defective statement of liabilities in the insolvent's schedule, was held not to invalidate the entire proceedings, and that where the statute was not substantially complied with in this respect, an omitted creditor was not prejudiced by a discharge, in any suit he might institute to recover his debt. *Slade v. His Creditors*, 10 Cal. 483.

A note for five hundred dollars by an insolvent to the order of Alfred McCarty, is not sufficiently described in the schedule by simply stating "Alfred McCarty, borrowed money \$500, April 1855," and a discharge in such case is no bar to a suit on the note. *McCarty v. Christie*, 13 Cal. 80.

Under the Act of 1852 the petitioner was required to give in his schedule a summary statement of his affairs, with a list of losses sustained, the names of his creditors, if known, the

amount due each, etc., and provided that his discharge should only affect such debts and liabilities as he shall have set forth and named in his schedule. A failure to give the name of a creditor was held fatal to the discharge in *Judson v. Atwell*, 9 Cal. 478. The amendment of 1860, (Stats. p. 283) contained a provision that the release and discharge shall not apply to the debts and liabilities not mentioned and set forth in the schedule unless the insolvent shall declare in his petition that it is his desire to be discharged from all his debts and liabilities and that he has described them according to the best of his knowledge and recollection; in which case the discharge and release shall embrace all his debts and liabilities notwithstanding they may have been imperfectly described or not described at all. *Held*, where the name of the holder of outstanding notes is not given and it is not stated that petitioner has no knowledge of who is the owner of them, yet the petition states that the schedule of debts and liabilities annexed contains the names of his creditors "as near as he can now state them, and the amount due each creditor; the cause and nature of said indebtedness," etc.; that this was tantamount to stating that he did not know who was the owner of the notes, and was a substantial compliance with the statute upon this point. And where the description of the notes in the schedule is sufficient for the holder thereof to have identified them upon an examination of the proceedings in insolvency it will be sufficient although the description in the schedule is imperfect. *Barrett v. Carney*, 33 Cal. 530.

Where in the schedule attached to the petition in insolvency of a mortgagor, which was filed after action of foreclosure was commenced, there was contained a description of the mortgaged premises and the mortgage, also the statement "suit for foreclosure commenced;" and the order of the judge before whom the insolvency proceedings were commenced provided "that all actions now pending may be prosecuted to judgment;" *held*, that notice of the action to foreclose was thereby imparted to the assignee of such insolvent, and to all parties purchasing from him, and they are bound by a valid judgment rendered in the foreclosure proceedings. *Sharp v. Lumley*, 34 Cal. 611.

Where the schedule describes a debt as a note of a certain tenor and date in a suit in a certain court when in fact the suit has gone to judgment, the mistake is not fatal; whether it had been reduced to judgment or not is not material, if the indebtedness is so described as to enable the creditor readily to identify it. *Brewster v. Ludekins*, 19 Cal. 162.

The omission from the schedule of debts which were in fact worthless and barred by the statute of limitations does not amount to fraud and false swearing, and is not ground for collateral attack upon the discharge. *Pope v. Kirchner*, 77 Cal. 152.

SECTION 5. The petition, schedule, and inventory must be verified by the affidavit of the petitioner annexed thereto, and shall be in form substantially as follows: I, ———, do solemnly swear that the schedule and inventory now delivered by me contain a full, perfect, and true discovery of all the estate, real, personal, and mixed, goods and effects, to me in any way belonging; all such debts as are to me owing, or to any person or persons in trust for me, and all securities and contracts, and contracts whereby any money may hereafter become payable, or any benefit or advantage accrue to me or to my use, or to any other person or persons in trust for me; that the schedule and inventory, respectively, contain a clear outline of the facts touching any known right of action against me by any one, and an outline of the facts touching all rights of action in my favor against any one; that I have no lands, money, stock, or estate, reversion, or expectancy, besides that set forth in my schedule and inventory; that I have in no instance created or acknowledged a debt for a greater sum than I honestly and truly owe; that I have not, directly or indirectly, sold, or otherwise disposed of, or concealed, any part of my property, effects, or contracts; that I have not in any way compounded with my creditors whereby to secure the same, or to receive or to expect any profit or advantage therefrom, or to defraud or deceive any creditor to whom I am indebted in any manner. So help me God.

This section is the same as section 5 of the Act of 1880, except the words relating to rights of action in favor of or against the affiant, which have been inserted in pursuance of the requirements in sections 3 and 4.

The provision of the Insolvent Act making it a misdemeanor to wilfully swear falsely that the petition and schedules contain all of the debtor's property, does not affect the statute against perjury. *People v. Platt*, 67 Cal. 21.

As to sufficiency of an information charging an insolvent debtor with perjury in swearing to the affidavit to his petition and schedules, see *People v. Naylor*, 82 Cal. 607.

SECTION 6. Upon receiving and filing such petition, schedule, and inventory, the court shall make an order declaring the petitioner insolvent, and directing the sheriff of the county, or city and county, to take possession of all the estate, real and personal, of the debtor, except such as may be by law exempt from execution, and of all his deeds, vouchers, books of account, and papers, and to keep the same safely until the appointment of an assignee. Said order shall further forbid the payment of any debts and the delivery of any property belonging to such debtor, to him, or for his use, and the transfer of any property by him; and shall further appoint a time and place for a meeting of the creditors, to prove their debts and choose an assignee of the estate, and shall designate a newspaper of general circulation published in the county, or city and county, in which the petition is filed, if there be one, and if there be none, in a newspaper published near-

est to such county, or city and county, in which publication of such order shall be made. The time appointed for the election of an assignee shall not be less than eight nor more than ten days from the date of the order of adjudication. Upon the granting of said order, all proceedings against the said insolvent shall be stayed. When a receiver is appointed or an assignee chosen, as provided for in this act, the sheriff shall thereupon deliver to such receiver or assignee, as the case may be, all the property and assets of the insolvent which have come into his possession, and shall be allowed and paid as compensation for his services the same expenses and fees as would by law be collectible if the property had been levied upon and safely kept under attachment.

The substance of this section was contained in section 6 of the Act of 1880, but some of the language has been transposed. The material difference between the old and the new consists in the time for the election of an assignee, the former act requiring that it should be not less than thirty days after the making of the order; and the provision for the sheriff's delivery to the receiver or assignee, and the sheriff's compensation were not in the former section.

In bankruptcy proceedings the time designated was to be not less than ten nor more than ninety days from the issuing of the notice.

*The notice.*

There is no constitutional objection to the act authorizing the county court to make the order directing the clerk to issue the order for meeting of creditors and directing an assignment to be made. An order which directs the clerk to issue "an order for the creditors to appear \* \* \* and show cause why the insolvent should not be discharged from his debts, in pursuance of the insolvent law [Act 1852], and likewise make an assignment for the benefit of his creditors," is a substantial compliance with said act. *Flint v. Wilson*, 36 Cal. 24.

As the petition is said to be the complaint, so the notice is said to be the summons. The notice is jurisdictional in the same sense. *Bennett v. His Creditors*, 22 Cal. 38; *Wilson v. His Creditors*, 32 *id.* 407.

If personal service of notice is attempted, see C. C. P. 410. By telegraph, *id.* section 1017.

It was held, even under the Act of 1852, that the order staying proceedings operated by its own force from its date, and without notice to a sheriff with a writ against the property of the insolvent. *Taffits v. Manlove*, 14 Cal. 48.

Under the Act of 1852 it is said "the statute did not require that the creditors shall have full thirty days notice from (and after) the day of the final publication, but that they shall appear



on a day, which day shall not be less than thirty days from the day of first publication." A notice published the first time on November 1, requiring creditors to meet December 1, was sufficient. *Wilson v. His Creditors*, 55 Cal. 476.

An affidavit in a case of insolvency under Act of 1852, as amended in 1863, stating that notice to creditors had been published at least four weeks beginning October 31, 1878, and ending on December 5, 1878, both days inclusive, is insufficient. The proceedings are *in invitum*, and the statute requires the notice to be published at least *as often as once a week* for four successive weeks. *Hernandez v. His Creditors*, 57 Cal. 333.

Under the Acts of 1852, 1876, the judge was not required to name the paper in which the notice to creditors shall be published. And where the order directed notice to be published in the "Woodland Democrat" once a week for four weeks, a publication in the "Woodland *Daily* Democrat" once each week for four successive weeks was sufficient. *Steele v. His Creditors*, 58 Cal. 244.

In a case of involuntary insolvency it is not required to serve notice on the creditors, who are the moving parties, of the order to show cause why the debtor should not be adjudged an insolvent. Jurisdiction to appoint an assignee is acquired by giving such notice to the debtor. *Ohleyer v. Bunce*, 65 Cal. 544.

Section 7 of the Act of 1880, permits a service of notice upon creditors to be made either personally or by mail. Either form of service is sufficient. *Pomeroy v. Gregory*, 66 Cal. 572.

Notice may be served by mail upon creditors residing at the place where insolvency proceedings are commenced. *Id.*

In involuntary proceedings the order to show cause may be served upon the debtor by publication with the same effect, so far as the rights of the assignee are concerned, as if served personally. *Arnold v. Kahn*, 67 Cal. 472.

Under the Act of 1852 as amended in 1863 (Statutes 1863 page 750) the county court on filing of a voluntary petition was required to issue notice to creditors to meet on a day not less than thirty days thereafter. *Held*, a notice issued on December 7 and returnable January 6, following, was sufficient. *Dean v. Grimes*, 72 Cal. 442.

#### *Adjudication.*

A decree adjudging a debtor insolvent is a judgment *in rem*. as to the status of the debtor. *Arnold v. Kahn*, 67 Cal. 472.

An order of the insolvency court staying proceedings would not prevent the issuance of execution on a judgment against the

debtor and sale of property subject to the lien of the judgment, at any time within the two years of the life of the lien. *Isaac v. Swift*, 10 Cal. 71.

It was not intended by the Acts of 1852, nor 1876, nor the United States Bankruptcy Law, that the court should inquire, *de hors* the record, whether the petitioner was in fact insolvent at the time of making the adjudication. If his petition and schedule show his insolvency on their faces, he is so adjudged, as of course; if they do not, the court may refuse to proceed. *Cerf v. Oaks*, 59 Cal. 132.

The order to stay proceedings operates by its own force, and notice thereof is not required to be given to the sheriff who has taken property under attachment nor to the court in which the attachment proceedings are pending. The Acts of 1852 and of 1880, are exactly alike in this respect. *Cerf v. Oaks*, 59 Cal. 132.

The order for creditors to show cause, the order for the clerk to give notice of the time and place of meeting, and the order staying proceedings may be, and in practice usually are, combined and may be made by the judge at chambers. *Flint v. Wilson*, 36 Cal. 24. C. C. P. Secs. 166-1004.

The order of the court forbidding the debtor to transfer any of his property, is in the nature of a provisional attachment or sequestration of his estate, and brings it under the control and dominion of the court. *State I. & I. Co., v. San Francisco*, 101 Cal. 135.

Where the name of the insolvent appears correctly twice in the published order of adjudication a clerical error therein by which the name is once incorrectly given, will not invalidate the publication. And where the name of the insolvent is written at the head of the affidavit of deposit in the postoffice as "H. K., being duly sworn says," but the affidavit is actually sworn to by another person, the affidavit is not vitiated, nor will a mistake in designating the address of the creditors in the affidavit by reference to the schedule which shows only their place of residence vitiate the discharge if the affidavit shows that the notice was addressed to the creditors at their place of business, nor a slight error in spelling the name of a creditor. *Pope v. Kirchner*, 77 Cal. 152.

Where property is held by a sheriff under attachment at the time of filing a petition in insolvency, and the insolvency court appoints a receiver to take charge of the property, *held*, the attaching creditor is as fully protected in whatever lien he may

have as though the property remained in the hands of the sheriff. *Von Roun v. Superior Court*, 58 Cal. 358.

*Stay of proceedings.*

Under the Bankruptcy Act, when a debtor had been declared a bankrupt, a creditor whose claim had been proven before the commissioner, could not commence an action against him to recover a debt until the proceedings in bankruptcy had been concluded without permission from the bankruptcy court. *Collins v. Sheeline*, 52 Cal. 450.

Prohibition will lie to restrain a justice's court from proceeding in certain matters included in section 45 of the Insolvency Act, notwithstanding an order of the Superior Court assuming to permit the justice's court to proceed. *Hayne v. Justice's Court*, 82 Cal. 284.

The provision of the 14th section of the Act of 1852, that all suits brought against the insolvent debtor prior to his surrender of property should be transferred to the insolvency court was held not to apply to actions to foreclose prior liens or mortgages. Prior liens or mortgages were not affected by insolvency further than that they would be confined to the proceeds of the mortgaged property, and the right of the assignee was confined to the surplus. *Rix v. McHenry*, 7 Cal. 89.

SECTION 7. A copy of said order shall immediately be published by the clerk of said court, in the newspaper designated therein, as often as said newspaper is printed before the meeting of creditors, and be served by the clerk forthwith by the United States mail, postage prepaid, or personally, on all creditors named in the schedule. There shall be deposited in addition to the usual cost of commencing such proceedings a sum of money sufficient to defray the cost of the publication ordered by the court, and ten cents for each copy, to be mailed to or served on the creditors, which latter sum is hereby constituted the legal fee of the clerk for the mailing or service required in this section.

Section 7 of the Act of 1880 contained the clause: "The order of adjudication shall direct the publication thereof." It is apparent from the present act that while it is the duty of the court to designate in its order the newspaper in which publication shall be made, it is the duty of the clerk to cause the publication to be made without being directed thereto by the order of adjudication. In other respects the sections are substantially alike.

Under the United States Bankruptcy Act the time for meeting of creditors was required to be not less than ten nor more than ninety days after the issuing of the warrant. And where creditors were so numerous as to make personal service or service by

mailing a great and disproportionate expense to the estate, publication alone was made sufficient as to all creditors whose claims were only fifty dollars or less.

Where a period of thirty days was given under the Act of 1852, it was held, that it made no difference that the notice was published for the time required; if the creditors do not have full thirty days from the date of the first publication of the notice to the day of the meeting, it is insufficient. *McDonald v. Katz*, 31 Cal. 168.

The date of publication of notice to creditors is the date on which the notice is first published in the paper. *Clarke v. Ray*, 6 Cal. 600.

Proof of the publication of the notice may be by the publisher. *Schloss v. His creditors*, 31 Cal. 201; *Barrett v. Carney*, 530.

When the last day of publication falls on Sunday, if it occurs in the regular issue of the paper, it does not vitiate the service. *Savings & L. Society v. Thompson*, 32 Cal. 347.

Under the Act of 1852, it was said the statute did not require that the creditors should have full thirty days' notice from (and after) the day of the final publication, but that they should appear *on a day*, which day shall not be less than thirty days from the day of first publication. A notice published the first time on November 1, requiring creditors to meet December 1, was sufficient. *Wilson v. His Creditors*, 55 Cal. 476; *Same Case*, 32 *id.* 406.

An affidavit in a case of insolvency, under the act as amended in 1863, stating that notice to creditors had been published at least four weeks, beginning October 1, 1878, and ending on December 5, 1878, both days inclusive, is insufficient. The proceedings are *in invitum*, and the statute requires the notice to be published at least as often as *once a week* for four successive weeks. *Hernandez v. His Creditors*, 57 Cal. 333.

See sections 412 and 2010 C. C. P. as to who may make affidavit of publication.

The affidavit showing deposit in the post-office need not state that there was communication by mail between the place of deposit and the place to which the packet is addressed, nor that the post-office was a United States post-office. *Sharp v. Daugney*, 33 Cal. 505.

The court acquires jurisdiction to make the order for notice to creditors by the filing of the petition but its subsequent proceedings depend for validity upon due notice to creditors. *Cerf v. Oaks*, 59 Cal. 132.

As to publication, proof thereof, and necessity for proof appearing in the record, see, among other cases, *County of Yolo v. Knight*, 70 Cal. 431; *Anderson v. Goff*, 72 *id.* 65; *Weeks v. Gold Mining Co.*, 73 *id.* 599. Amendment of affidavit of publication, *In re Newman*, 75 *id.* 213.

The code provisions are not invalid because they include proceedings which are *in personam*. *Perkins v. Wakeham*, 86 *id.* 580. But the proof of service is necessary to give the court jurisdiction. *Reinhart v. Lugo*, 86 *id.* 395; and see cases under "Jurisdiction" *ante* section 1.

The court acquires jurisdiction in involuntary insolvency upon the filing of the petition properly signed and verified and service of copy thereof with a copy of the order to show cause upon the debtor, and errors thereafter committed in the course of the proceedings do not render its judgment or orders liable to collateral INS. ACT 1895—AMENDED 1897.

SECTION 8. No claim shall be entitled to a vote for the election of an assignee, unless such claim shall be placed on file in the office of the clerk of the court in which the proceedings are pending, at least two days prior to the time appointed for the election of an assignee. All claims shall be established by a statement, showing the amount and nature of the claim, and security, if any; such statement to be verified by the claimant, his agent or attorney; *provided*, no claim barred by the statute of limitations shall be proved or allowed against the estate of an insolvent debtor for any purpose. Any person interested in the estate of the insolvent may file exceptions to the legality or good faith of any claim, by setting forth specifically in writing, his interest in the estate, and the grounds of his objection to such claim; such specifications of exceptions to be verified by the affidavit of the party objecting, his agent or attorney, setting out among other things that such exceptions are not made for the purpose of delay, or otherwise than in good faith in the best interest of said estate. Such exceptions to be filed with the clerk of the court at least one day before the time appointed for the election of an assignee; and such exceptions shall be heard and disposed of by the court, on affidavit or other evidence, in a summary manner, before the election of an assignee. But the decision of the court upon the exceptions as to whether the claimant shall be entitled to vote for an assignee shall not be conclusive upon the right of the party to participate in the assets of the insolvent, the enforcement of such right being subject to the laws of the state touching the establishment of claims against the estates of insolvents in case of dispute. No creditor or claimant, who holds any mortgage, pledge, or lien of any kind whatever, as security for the payment of his claim, shall be permitted to vote any part of his secured claim in the election of assignee, unless he shall first have the value of such security fixed as provided in section forty-eight of this act, or surrender to the sheriff or receiver of the estate of the insolvent, if any receiver, all such property so mortgaged or pledged, or assign such lien to such receiver or sheriff; such surrender or assignment of security or lien to be for the benefit of all creditors of the estate of the insolvent. The value of such security, if fixed by the court, shall be so fixed at least one day before the day appointed for the election of an assignee; in which event the claimant may prove his demand, as provided in this section, for any unsecured balance, subject to the same exceptions as all other claims. [In effect 60 days from February 26, 1897.]

shall first have the value of such security fixed as provided in section forty-eight of this act, or surrender to the sheriff or receiver of the estate of the insolvent, if any receiver, all such property so mortgaged or pledged, or assign such lien to such receiver, or sheriff; such surrender or assignment of security or lien to be for the benefit of all creditors of the estate of the insolvent. The value of such security, if fixed by the court, shall be so fixed at least one day before the day appointed for the election of an

assignee; in which event the claimant may prove his demand, as provided in this section, for any unsecured balance, subject to the same exceptions as all other claims.

This section is almost entirely new. The Act of 1880, section 15, with reference to claims, merely provided: "At a meeting of the creditors in open court, those having proven their claims by filing a verified statement showing the amount, nature, and security, if any, shall proceed to the election of one assignee." That section then provided for the clerk keeping a minute of the deliberations of the creditors and for the giving of bond by the assignee, which matters are provided for in section 19 of the present act.

The wisdom of these provisions is yet to be demonstrated. Where an estate is large and creditors numerous, the time—eight or ten days in which creditors are to meet is very limited, and this is again shortened two days so far as the preparation and filing of claims is concerned. It is impracticable in almost any case to determine, within one day, whether objections should be made to claims on file, and equally or more impracticable for claimants to know of or be prepared to meet objections to their claims which may be filed twenty-four hours prior to the meeting. Without attempting to analyze the proceedings which these provisions will prompt, it is suggested that they will lead to much confusion and frequent applications for delay, for it will not be more difficult to frame unfounded or merely suspicious objections under the statute than to present false claims.

Accrued interest constitutes part of a debt provable against a bankrupt, and may be included in the amount necessary to sustain involuntary proceedings. *Sloan v. Lewis*, 22 Wall. 150, Law Ed. 22, 832.

Where a creditor's claim is secured only to a certain amount, it is not error to allow such creditor to participate in the election of an assignee to the extent of the amount unsecured. *Widber v. Superior Court*, 94 Cal. 430.

The proceedings in the Superior Court will not be reviewed on *certiorari*, because that court appointed an attorney to vote the claim of an absent creditor at the election of an assignee and appointed the person assignee who was chosen at that election. That court had jurisdiction over the proceedings. *Tomasini v. Superior Court*, 75 Cal. 225.

## ARTICLE III.

## INVOLUNTARY INSOLVENCY.

SECTION 9. An adjudication of insolvency may be made on the petition of five or more creditors, residents of this state, whose debts or demands accrued in this state, and amount in the aggregate to not less than five hundred dollars; *provided*, that said creditors, or either of them, have not become creditors by assignment within thirty days prior to the filing of said petition. Such petition must be filed in the Superior Court of the county, or city and county, in which the debtor resides or has his place of business, and must be verified by at least three of the petitioners, setting forth that such person is about to depart from this state, with intent to defraud his creditors; or being absent from the state with such intent, remains absent; or conceals himself to avoid the service of legal process, or conceals, or is removing, any of his property to avoid its being attached or taken on legal process; or being insolvent, has suffered his property to remain under attachment, or legal process, for three days; or has confessed or offered to allow judgment in favor of any creditors; or willfully suffered judgment to be taken against him by default; or has suffered or procured his property to be taken on legal process, with intent to give a preference to one or more of his creditors; or has made any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, with intent to delay, defraud, or hinder his creditors; or in contemplation of insolvency, has made any payment, gift, grant, sale, conveyance, or transfer of his estate, property, rights, or credits; or has been arrested and held in custody by virtue of any civil process of court founded on any debt or demand, and such process remains in force, and not discharged by payment, or otherwise, for a period of three days; or being a merchant or tradesman, has stopped or suspended, and not resumed payment within a period of forty days after the maturity of any written acknowledgment of indebtedness, unless the party holding such acknowledgment has, in writing, waived the right to proceed under this subdivision; or being a bank or banker, agent, broker, factor, or commission merchant, has failed for forty days to pay any moneys deposited with or received by him in a fiduciary capacity, upon demand of payment, excepting savings and loan banks, or associations who loan the money of their stockholders and depositors on real estate, and provide in their by-laws for the repayment of such deposits. The petitioners may, from time to time, amend and correct the petition, so that the same shall conform to the facts, by leave of the court before which the proceedings are pending, such amendment or amendments to relate back to and be received as if embraced in the original petition; but nothing in this section shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith upon a security taken in good faith on the occasion of the making of such loan. The said petition shall be accompanied by a bond with two sureties in the penal sum of at least five hundred dollars, conditioned that if the debtor should not be declared an insolvent, the petitioners will pay all costs and damages, including a reasonable attorney's fee, that the debtor may sustain by reason of the filing of said petition. The court may, upon motion, direct the filing of an additional bond with different sureties, when deemed necessary.

This section is practically the same as section 8 of the Act of 1880. Under the former, four instead of three days were required for the insolvent's property to remain under attachment or legal process. Twenty days was the period specified in the Bankruptcy Act. And the words "such amendment or amendments to relate back to and be received as if embraced in the original petition," have been inserted as being consonant to judicial construction. The section is derived from section 5021, U. S. Rev. Stats.

The insolvent practically disappears from the proceedings as a party, and only the execution of the trust remains. The proceedings in involuntary proceedings are *quasi in rem*. They are proceedings by creditors to establish their claims against the property. *Rued v. Cooper*, 34 Pac. Rep. 98.

The failure of the petitioning creditors to file the bond required, as where the bond is signed by the sureties and not by the creditors, is not jurisdictional to that extent that the objection may be raised for the first time in the Supreme Court. Such objection should be raised while the defect could be cured. *Creditors v. Consumer's Lumber Co.*, 98 Cal. 318; *Citing Dixon v. Allen*, 69 *id.* 528; *Greiss v. State Invest. & Ins. Co.*, 98 *id.* 241.

In involuntary proceedings, the court acquires jurisdiction upon the filing of the petition properly signed and verified, and service of copy thereof with copy of the order to show cause upon the debtor; and errors thereafter committed in the course of the proceedings do not render its judgment or orders liable to collateral attack. *Luhrs v. Kelly*, 67 Cal. 289.

Delay in prosecuting involuntary proceedings on the part of creditors will be cause for dismissal where no sufficient reason for the delay is offered. (Stats. 1875-6, p. 581. Secs. 6-8.) *Konahrens v. His Creditors*, 64 Cal. 492.

A verification of the petition by creditors in the form required for verification of pleadings is sufficient. *Wright v. Cohn*, 88 Cal. 328; C. C. P. Secs. 446, 2009.

Where in involuntary insolvency several creditors joining in the petition are required also to verify the petition, it is not improper for the verification to be upon information and belief, since there will necessarily be some statements on information and belief, although the petition may not allege that any of its statements are so made. *Wright v. Cohn*, 88 Cal. 328.

A petition in involuntary insolvency is not fatally defective in alleging that "A and B" doing business under the firm name of etc., are indebted, instead of alleging that the firm "A and B,"



is indebted—in either form it sufficiently appears that the partnership is indebted. *Id.*

A writ of prohibition will be granted to restrain a Superior Court from proceeding upon a petition of creditors against a banking corporation in insolvency. The Banking Act of 1877–8 (Stats. p. 740) as amended in 1887, (Stats. p. 90) was intended to and has the effect of providing for every case involving the winding up of the affairs of such corporations, and supersedes the Insolvent Act of 1880. *People v. Superior Court*, 100 Cal. 111.

Where proceedings in involuntary insolvency have been dismissed for want of prosecution, new proceedings may be commenced by the creditors. *Kornahrens v. His Creditors*, 64 Cal. 492.

A creditor may join in involuntary proceedings although his debt is not yet due, and it does not appear necessary to allege in the petition a breach of the contract. *In re Dennery*, 89 Cal. 101, and see cases there cited.

It is said that only the facts required in section 8 of the act need be stated in the petition for involuntary insolvency, and that an answer setting up that petitioning firms had not filed or published certificates of their partnership did not raise a material issue. Harrison, J., dissenting, points out that it appeared that as to one of the creditor firms, all the members were not residents of this state—one being a non-resident—and that therefore the petition did not confer jurisdiction. *Id.*

The insolvent should have an opportunity to deny and contest the claims of petitioning creditors prior to an adjudication of his insolvency, and it is equally true that he should have notice of the facts on which the claims of indebtedness are based in order to properly make such contest. *In re Russell*, 70 Cal. 132. *Id.*

As to the sufficiency of allegations of indebtedness in a petition in involuntary insolvency, see *Seattle Coal Co. v. Thomas*, 57 Cal. 197.

In involuntary proceedings the order to show cause may be served upon the debtor by publication with the same effect, so far as the rights of the assignee are concerned, as if served personally. *Arnold v. Kahn*, 67 Cal. 472.

In a case of involuntary insolvency it is not required to serve notice on the creditors, who are the moving parties of the order to show cause why the debtor should not be adjudged an insolvent.

Jurisdiction to appoint an assignee is acquired by giving such notice to the debtor. *Ohleyer v. Bunce*, 65 Cal. 544.

The petition in involuntary insolvency need not give the names of persons belonging to firms of petitioning creditors. In the *Matter of Russell*, 70 Cal. 132.

But facts showing the indebtedness of the insolvent to at least five petitioners must be alleged as fully as would be required in a complaint in an ordinary action to recover a debt. *Id.*

As to the sufficiency of a petition in involuntary insolvency see *Mogk v. Peterson*, 75 Cal. 498.

Residents of this state are not entitled to file a petition in involuntary insolvency upon claims assigned to them solely for that purpose by non-resident creditors. In the *Matter of Baum*, 68 Cal. 238.

The insolvent is not required to file a verified inventory or schedule in involuntary proceedings, and his discharge cannot be successfully resisted because the inventory and schedule filed by him in obedience to the order of the court is not verified. [Sec. 13 of the Act of 1895, requires the debtor to verify.] *Matter of Green*, 96 Cal. 162.

A verification of the petition of creditors in the form required for verification of pleadings is sufficient. *Wright v. Cohn*, 88 Cal. 328; Secs. 446, 2009 C. C. P.

Under the act prior to 1880, the petition and schedule were required to be sworn to before the judge of the court to which the petition was addressed, and it was held that where they were sworn to before a notary public, the court did not acquire jurisdiction. *Baker v. Everhart*, 65 Cal. 27.

The words "and belief" in the verification of a petition in involuntary insolvency are treated as surplusage—they neither add to nor take from the force of the words preceding, viz: "That the same is true of his own knowledge." *Seattle Coal Co. v. Thomas*, 57 Cal. 197.

A petitioning creditor is not required to make full and satisfactory proof of the debtor's insolvency, but must offer proof tending to show such insolvency, and the debtor must then explain the evidence if he can. *Id.*

In the same case it is held that where a prohibited preference is relied upon, no specific evidence of the intent to prefer is necessary when a payment is made by an insolvent debtor, for the act itself is evidence of the intent. But if the debtor was unaware of his insolvency, the intent to prefer will not be presumed;

but it is incumbent upon him to show that he was unaware of his insolvency. And see *Bull v. Bray*, 89 Cal. 286.

[The following cases from Bankruptcy Register Reports may be referred to, not as authority but as illustrating the rulings of the U. S. District Courts upon the sufficiency of creditor's petitions under the corresponding section of the Bankruptcy Act from which section 8 of the Act of 1880, and this section of the present act have been drawn.]

In an involuntary proceeding against a separate partner, creditors of the partnership are to be counted in ascertaining the number and value. *In re Lloyd*, 15 R. R. 257.

Secured creditors are not to be reckoned in computing the proportion of creditors who must join in the petition. *In re Green Pond R. R. Co.* 13 B. R. 118.

"Debts provable under the Act" means only unsecured debts. *Id.* and *In re Trost*, 11 B. R. 69.

A secured creditor surrenders his security by joining in an involuntary petition. *In re Broich*, 15 B. R. 11.

And debts barred by limitation are to be disregarded. *In re Noesen*, 12 B. R. 422.

[It should be remembered that under the Bankruptcy Act, one or more creditors who shall constitute one-fourth of all the insolvents creditors and whose claims amount to at least one-third of the debts provable against him, were required to join in the petition. In this respect it differed materially from the California Acts.]

In involuntary proceedings the burden of proof is upon the petitioners. *In re Oregon Printing Co.*, 13 B. R. 503.

A person of unsound mind cannot commit an act of bankruptcy. *In re Weitzel*, 14 B. R. 466. But a lunatic may be proceeded against. *Id.* See, however, *In re Murphy*, 10 B. R. 48. And a voluntary petition may be filed in behalf of a lunatic by his guardian. *In re Pratt*, 6 B. R. 169.

The petition should contain such a statement of the creditors' demands as that the court may see that they are provable debts. And depositions to the act of bankruptcy should be made upon the personal knowledge of the deponent. *In re Hadley*, 12 B. R. 366.

The pleader may set up a general suspension of payment, without describing any paper of the debtor, or he may allege suspension with reference to a particular piece of commercial paper and rely upon it as *prima facie* evidence of general suspension. *Id.*, and *McClean v. Brown*, 4 B. R. 585. *In re Hercules Mut. L. Ins. Soc.*, 6 *id.* 338. *In re Wilson*, 8 *id.* 396.

SECTION 10. Upon the filing of such creditors' petition, the court, or a judge thereof, shall issue an order requiring such debtor to show cause, at a time and place to be fixed by said court, or judge, why he should not be adjudged an insolvent debtor, and at the same time, or thereafter, upon good cause shown therefor, said court, or judge, may make an order forbidding the payment of any debts, and the delivery of any property belonging to such debtor to him or for his use, or the transfer of any property by him.

This section is substantially the same as section 9 of the Act of 1880, the only difference being that "a judge" of the court may make the orders. In other words, these orders may be made in court or in chambers. The order forbidding the payment of debts and delivery of property belonging to the debtor, is in the nature of injunction, and is not made "as of course" upon the filing of the petition, but must be applied for on showing of "good cause." It is presumed that sufficient showing may be made in the petition itself.

The restraining order mentioned in this act is evidently intended to operate only until the hearing upon the petition and the answer thereto, if any, on the part of the debtor. If an adjudication of insolvency results from the hearing, such order is then made as of course, (section 13), but it is evident that the debtor is not to be forbidden all management or disposition of his effects without a substantial showing by the verified petition, or by affidavits, of probable deterioration in the value of his estate and consequent injury to creditors unless he is restrained from dealing with it. An act of actual fraud is at most but presumptive evidence of an intent to commit further fraud of like character, and it is suggested that the application for this order should be supported by facts leading as conclusively to its necessity, as are required in any other application for injunctive relief. The property of the debtor is not subject to seizure in these proceedings until he has been adjudged an insolvent, and the adjudication must be accompanied by findings of the facts upon which it is predicated, after a trial of the issue of facts, or upon default in not answering the petition. (See 13, *post*.)

It has not been overlooked that section 67 of this act provides for the appointment of a receiver, but the circumstances under which that can be done are limited to cases where the debtor's property has been pledged, mortgaged, transferred, etc., in contravention of section 59, *and it is necessary to commence an action to recover the same*; and it may be assumed that a receiver will be appointed in any case where this showing is made by the petition, but without that showing, or such showing as is ordinarily

required for injunction in other cases, it is difficult to justify any restraining order prior to the adjudication. In his dissenting opinion in *Godey v. Godey*, 39 Cal. 168, Chief Justice Rhodes states the well supported proposition that injunction will not lie to restrain the collection of debts unless a receiver be appointed. The rule is also stated in *High on Injunc.* 2nd Ed., in the closing sentence of section 1334, that a creditor at large is not entitled to the interference of a court of equity to prevent his debtor from disposing of his property, but must first reduce his claim to judgment.

"Adjudication" in insolvency proceedings may be regarded as equivalent to "judgment" in other cases, and it is true that in proceedings supplementary to execution, injunction may issue without the intervention of a receiver.

That injunction is not allowed before judgment, and the theory of, and exceptions to the rule are fully discussed in *Waite Fraudulent Conveyances*, sections 52-53, 185.

It is true that where judgment has been obtained, injunctions are granted in "supplementary proceedings" without the intervention of a receiver. *High Inj.*, section 1410, C. C. P. sections 714, 715.

Section 49 of the present act also provides for injunction, but it evidently has reference to a time subsequent to adjudication.

Section 63 of the Act of 1880, provided for the appointment of a receiver before the election of an assignee, where it was shown that there was danger of the property being lost, etc., and in all other cases where receivers are appointed by the usages of courts of equity. This was repealed in 1891 (Stats. p. 511) and section 6 of the Act, which referred to "voluntary" proceedings, authorized the appointment of the sheriff as a receiver.

Whether section 67 of the present act will be construed to prohibit the appointment of receivers for other causes, may be questioned. But it seems plain that "cause" must be specifically shown, to justify any preliminary injunction, and it is equally plain, upon principle and authority, that such order should be accompanied by the appointment of a receiver.

It is said by Justice Harrison in *Ex parte Clancy*, 90 Cal. 557, that section 64 of the Act of 1880, did not limit the jurisdiction of the Superior Court in matters of contempt, and it may be held that section 67 does not preclude the appointment of receivers under the conditions prescribed in section 564 C. C. P. And see *People v. C. P. R. R.*, 83 Cal. 393. And to same effect concerning appeals. *In re Dennery*, 84 Cal. 7.

In *Vermont Marble Co. v. Superior Court*, 99 Cal. 579, it is said proceedings in insolvency are purely statutory, and the court, in exercising its authority, is limited by the statute. Section 9 of the Act of 1880, contained all the authority the court had to restrain the creditors of the alleged insolvent, either by a general order, or by an order directed to an individual creditor. There was no authority for restraining a sheriff from selling under an execution levied prior to commencement of insolvency proceedings.

Following was the provision on this subject in the U. S. Bankruptcy Act:

"U. S. R. S. Section 5024.—Upon the filing of the petition authorized by the preceding section, if it appears that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted. The court may also, by injunction, restrain the debtor, and any other person, in the meantime, from making any transfer or disposition of any part of the debtor's property not excepted by this title from the operation thereof, and from any interference therewith; and if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or to make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest and safely keep the alleged debtor, unless he shall give bail to the satisfaction of the court, for his appearance from time to time, as required by the court, until its decision upon the petition, or until its further order, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court.

The averments of the petition for an injunction should be positive, and not on information and belief. *In re Bloss*, 4 B. R. 147.

The injunction may be addressed to the debtor and all other persons who may attempt to transfer or interfere with his property. The fact that such other persons are not named in the order makes no substantial difference. *In re Lady Bryan Mining Co.*, 6 B. R. 252.

A party is liable for breach of an injunction after notice of its having been obtained, although the order has not been

served upon him. All that is required is that the defendant should have knowledge of the order for the injunction, and the court may punish the violation of the order, though the injunction be not served, if it appear that the defendant knew of its existence. The belief that the order has been made and concealment to avoid service are sufficient. The right to indemnify for the damages occasioned by a breach of the injunction can not be in any way affected by the fact that the defendant acted under the advice of counsel. The fine should be equal in amount to the actual loss and expenses occasioned by his misconduct. *In re Feeny*, 4 B. R. 233.

The restraining power of the court is limited in point of time to the period of time expressed by the words "in the mean time," and those relate manifestly to the period of time between the entering of the order to show cause and the time specified therein for the hearing. The most extended construction that can be given to these words, is that they are intended to cover the whole period up to such time as a hearing and adjudication shall be had upon the petition for an adjudication in bankruptcy. There is no warrant whatever for extending their meaning beyond that. Acts which are done after the restraining power of the injunction, has ceased to operate, do not make the parties liable for a contempt. *In re Moses*, 6 B. R. 181.

If the contempt committed by the bankrupt in collecting money from his debtors is not of a willful character, it may be purged by turning everything over to the assignee, and will not then be visited by punishment, either personal or pecuniary. *In re J. P. Hayden*, 7 B. R. 192.

An error in dating an order to show cause, which was manifest, by reference to the date of commencing the proceedings and by the face of the order, is of such a character that it may be corrected by the record, by order of the court. *Smith v. His Creditors*, 59 Cal. 267.

SECTION 11. A copy of said petition, with a copy of the order to show cause, shall be served on the debtor, in the same manner as is provided by law for the service of summons in civil actions, but such service shall be made at least five days before the time fixed for the hearing; *provided*, that if, for any reason, the service is not made, the order may be renewed, and the time and place of hearing changed by supplemental order of the court; *provided, however*, that where the debtor or debtors on whom service is to be made reside out of this state; or has departed from the state; or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of the order to show cause, or any other process or orders in the matter; or is a foreign corporation, having no managing or business agent,

cashier, or secretary within the state, upon whom service can be made, and such facts are shown to the court, or a judge thereof, by affidavit, such court or judge thereof shall make an order that the service of such order, or other process, be made by publication, in the same manner, and with the same effect, as service of summons by publication in ordinary civil actions.

In addition to limiting the time for appearance to five days, this section differs from section 10 of the Act of 1880, by reciting the language of section 412, C. C. P., instead of simply saying: "If such debtor cannot be found, or his place of abode ascertained, service shall be made by publication, as is provided in the Code of Civil Procedure."

If a general law relating to collection of taxes cannot prescribe a form of complaint differing from that prescribed in the Code of Procedure, and if appeals and contempts in insolvency cases are to be governed by the rules prescribed in the Code of Procedure, and if the petition in insolvency and the order to show cause are to be likened to a complaint and summons, it may be contended that the respondent is entitled to ten and thirty days respectively, where the order is served personally or by publication, in which to appear and show cause.

Time to answer is as much a part of "procedure" as is the contents of a pleading or the grounds of appeal. General laws must have a uniform operation. Const. Art. I, Sec. 11 and Art. IV, Sec. 25; *People v. C. P. R. R.*, 83 Cal. 393; *Ex parte Clancy*, 90 *id.* 553; *Dougherty v. Austin*, 94 *id.* 626 and 603; *City of Pasadena v. Stimson*, 91 *id.* 238; *Miller v. Kister*, 68 *id.* 142. But see *People v. Henshaw*, 76 *id.* 444; *Logan v. Solano Co.*, 65 *id.* 125; *Cody v. Murphy*, 89 *id.* 522; *Boys and Girls Aid Society v. Reis*, 71 *id.* 627; *Ex parte Jordan*, 62 *id.* 464; *Ex parte Lizzie Williams*, 87 *id.* 78.

It will be observed that this section says the service by publication is to be in the same manner and with the same effect as under the Code of Civil Procedure. Under 413, C. C. P., the service is complete at the expiration of the period of publication, hence the debtor, like the defendant in other cases, has the same time after the completion of the publication, that he would have after personal service, in which to answer or demur. And it is difficult to reconcile this section with the general procedure of the state, unless the court, in case of publication, extend the time to show cause to thirty days after service is complete, as it cannot be presumed that the legislature intended that an insolvent debtor, absent from the state, should have only five days in which to answer after service.

It will be observed also that section 2010, C. C. P., requires the



affidavit of the printer to specify "the times when and the paper in which the publication was made," while subdivision 3 of section 415, only requires an affidavit "showing the same." It is suggested that in all cases the affidavit should comply fully with 2010, as then it will certainly be sufficient under 415.

Heretofore the affidavit *for* publication was not made part of the judgment roll, but the affidavit *of* publication, like other proofs of service, was part of the judgment roll. *La Fetra v. Gleason*, 101 Cal. 246. By amendment of section 670, C. C. P., the affidavit *for*, and order directing publication, are now included as part of the roll. Stats. 1895, Palm Ed. p. 45.

The affidavit in insolvency cases should be filed with the clerk of the court where the proceedings are pending. Sec. 2011 C. C. P.

As title to real property will become involved in a majority of cases in insolvency, it is important that jurisdiction be acquired in an indisputable manner prior to the conveyance by the clerk of the court to the assignee. The affidavits of mailing or personally serving notice, and affidavits of publication, especially, should be closely scrutinized, to the end that they comply in a substantial manner with the provisions of the act, and the general law.

That the petition is analogous to the complaint, and the order to show cause is to be compared to summons in ordinary actions, see *Bennett v. His Creditors*, 22 Cal. 38; *Wilson v. His Creditors*, 32 *id.* 406.

Where on appeal the jurisdiction of the lower court is attacked for want of service of summons, and judgment has been taken by default, the affidavit of publication required by subdivision 3, section 415, C. C. P., should be made to appear in the record, and in the absence of such affidavit, the recitals in the judgment will not be accepted as a substitute for the proof of service of the summons. *Weeks v. Gold Mining Co.*, 73 Cal. 599.

Service of summons out of the state can only be made when publication has been duly ordered, and a prior service out of the state is of no avail. *McBlain v. McBlain*, 77 Cal. 510.

The question of the sufficiency of the affidavit for an order for publication, and of the order itself, can be raised only by a motion made in the action, or by appeal supported by a statement. *Sharp v. Daughney*, 33 Cal. 514, 515.

A defective affidavit of service of summons will not support a judgment by default. *Hyde v. Redding*, 74 Cal. 500, 501; *Reinhart v. Lugo*, 86 *id.* 395.

The affidavit of service should show that the party making

service possessed the requisite qualifications. *Peck v. Straus*, 33 Cal. 678; *Maynard v. McCrellish*, 57 *id.* 355; *Howard v. Gallo-way*, 60 *id.* 11; *Doerfler v. Schmidt*, 64 *id.* 265; *Lyons v. Cunningham*, 66 *id.* 42.

The affidavit for procuring an order for publication (where the complaint is unverified) must state the *facts* showing a cause of action against the non-resident defendant, and that he is a necessary or proper party, otherwise the court will not acquire jurisdiction by the publication. Merely stating that plaintiff has a good cause of action against the defendant is not sufficient. Merely repeating the language of the statute is not sufficient. *County of Yolo v. Knight*, 70 Cal. 433.

In an action of unlawful detainer, plaintiff's affidavit for publication stated that when the action was brought, the defendant disappeared and could not be found in the city or county; that plaintiff made inquiry at different places and of various persons, who knew defendant and would be likely to know his whereabouts, but was unable to find him; that eight new summons had been issued and four competent persons had been employed to obtain service; that since the commencement of the suit, defendant had not been in his accustomed resorts, but has left an agent collecting rents for the premises in dispute, from subtenants. That affiant does not know defendant's whereabouts and believes that he conceals himself to avoid service of the summons, *Held*, sufficient to justify an order for publication. *Bradford v. McAvoy*, 99 Cal. 324.

Where the affidavit for order of publication shows that the residence of defendant is known and gives the place of his residence abroad, it need not allege that an attachment has issued against his property, nor that he has any property in the state, nor need it show diligence in endeavoring to find him within the state, nor need there be any return of an officer showing that he cannot be found. *Anderson v. Goff*, 72 Cal. 69; *Furnish v. Mullan*, 76 *id.* 646.

The requirement that the affidavit shall state whether or not the residence of the defendant is known, applies only to non-resident and not to persons concealed, etc. This is shown by section 413, which provides that "where the residence of a non-resident or absent defendant is known," the order must direct, etc. *Ligare v. Cal. S. R. R.*, 76 Cal. 614.

Citations may be served by publication. *Spencer v. Houghton*, 68 Cal. 86-7; *Ashurst v. Fountain*, 67 *id.* 18; Sec. 1709 C. C. P.

The provisions of section 412 C. C. P., are not invalid because

broad enough to include proceedings purely *in personam*. The state has power to regulate the tenure and conditions of ownership and modes of establishing the same, of immovable property within its limits whether the owner be a citizen or stranger. *Perkins v. Wakeman*, 86 Cal. 581.

A notary public cannot make proof of service of summons by himself, by a certificate. He must make the usual affidavit. *County of Yolo v. Knight*, 70 Cal. 432.

The affidavit of deposit in the post-office need not state that the person who made the deposit was a white male citizen. It is sufficient if the deposit be made by a human being. Nor need the affidavit state that there was communication by mail between the place of deposit and the place to which the package was addressed. Nor that the post-office was a United States post-office. *Sharp v. Daughney*, 33 Cal. 513.

That a cause of action exists is not required to be shown both by the complaint and by affidavit. It must appear either by one or the other, and the affidavit may adopt the showing made in the complaint by referring to the unverified complaint and adopting its statements.

The affidavit should not merely follow the language of the statute but should set forth the evidence from which diligence can be inferred, (where diligence is required) and if from these facts it appears that a judge might have been satisfied, the showing will be held sufficient on collateral attack. *Ligare v. Cal. S. R. R. Co.*, 76 Cal. 611.

As to the necessity for affidavit and order for publication see also *People v. Harrison*, 84 Cal. 607, and cases there cited.

Amended affidavits showing service by publication may be received after judgment and before the judgment roll is made up. *In re Newman*, 75 Cal. 219-220.

Proof of publication can only be made by the affidavit of the printer, his foreman or principal clerk, and the affidavit should state that the affiant holds one of these positions. An affidavit commencing: "A. B., principal clerk, etc., being sworn, deposes and says," is insufficient. *Steinbach v. Leese*, 27 Cal. 295, and see *Sharp v. Daughney*, 33 *id.* 514. *Hahn v. Kelly*, 34 *id.* 419.

Where the order for publication of summons omitted the word "forthwith" in directing the mailing of the complaint and summons, but the same were mailed on the same day the order was made, *Held*, the order was sufficient, and the omission was mere irregularity which could not be taken advantage of collaterally. *Anderson v. Goff*, 72 Cal. 73.

As to character of proceedings generally in which jurisdiction may be acquired by publication of summons, see *Crall v. Poso Irrigation Dist.*, 87 Cal. 141, and generally as to effect of publication in the matter of conferring jurisdiction, see *Belcher v. Chambers*, 53 Cal. 635.

SECTION 12. At the time fixed for the hearing of said order to show cause, or such other time as it may be adjourned to, the debtor may demur to the petition for the same causes as is provided for demurrer in other cases by the Code of Civil Procedure. If the demurrer be overruled, the debtor shall have five days thereafter in which to answer the petition. If the debtor answer the petition, such answer shall contain a specific denial of the material allegations of the petition controverted by him, and shall be verified in the same manner as pleadings in civil actions; and the issues raised thereon may be tried with or without a jury, according to the practice provided by law for the trial of civil actions.

Grounds of demurrer, section 430, C. C. P.

Verification of pleadings, section 466, C. C. P.

Trial in civil actions, sections 588-600, C. C. P.

This section corresponds to section 10 of the Act of 1880, but the former gave ten days time in which to answer after overruling of demurrer.

SECTION 13. If the respondent shall make default, or if, after a trial, the issues are found in favor of the petitioners, the court shall make an order adjudging that said respondent is, and was at the time of filing the petition, an insolvent debtor, and that the debtor was guilty of the acts and things charged in the petition, or such of those acts and charges as the court may find to be true; and shall require said debtor, within such time as the court may designate, not to exceed three days, to file in court the schedule and inventory provided for in sections three and four of this act, duly verified as required of a petitioning debtor; *provided*, that in the affidavit of the insolvent touching his property and its disposition, he shall not be required to swear that he has not made any fraudulent preference, or committed any other act in conflict with the provisions of this act; but he may do so if he desires. Said order shall further direct the sheriff of the county, or city and county, where the insolvency petition is filed, or the receiver, if one has been theretofore appointed, to take possession of all the estate, real and personal, of the debtor, except such as may be by law exempt from execution, and of all his deeds, vouchers, books of account, and papers, and to keep the same safely until the appointment of an assignee. Said order shall further forbid the payment of any debts, and the delivery of any property belonging to such debtor, to him, or for his use, and the transfer of any property by him; and shall further appoint a time and place for a meeting of the creditors, to prove their debts, and choose an assignee of the estate, and shall designate a newspaper of general circulation published in the county, or city and county, in which the petition is filed, if there be one; and if there be none, in a newspaper published nearest to such county, or city and county, in which publication of said order shall be made. The

time appointed for the election of an assignee shall not be less than eight nor more than ten days from the date of the order of adjudication. Upon granting of said order, all proceedings against the said insolvent shall be stayed. When a receiver is appointed subsequent to adjudication, or an assignee is chosen as provided for in this act, the sheriff shall thereupon deliver to such receiver or assignee, as the case may be, all the property and assets of the insolvent which have come into his possession, and shall be allowed and paid as compensation for his service the same expenses and fees as would by law be collectible if the property had been levied upon and safely kept under attachment.

The subject matter of this section corresponds to section 12 of the Act of 1880, and U. S. Bankruptcy Act, Sec. 5028, Rev. Stats. Section 12 of the Act of 1880 required the debtor to file schedule and inventory "within such time as the court shall designate." U. S. Bankruptcy Act, (Rev. Stats. 5030) "within such number of days, not exceeding five after the date of the order or notice thereof," etc.

The provision for finding the respondent "guilty of the acts and things charged in the petition, or such of those acts and charges as the court may find to be true," is new. The former provision was: "The court shall make an order adjudging that said respondent is, and was at the time of filing the petition, an insolvent debtor." In many cases, therefore, if not in all, the findings of the court will be specific as to the grounds upon which the adjudication rests. And the proceeding not being "an action arising upon contract for the recovery of money or damages only," proofs are required, even upon default, as in "judgments upon failure to answer." Sec. 585, C. C. P.

The remainder of the section is made up of provisions contained in sections 6 and 7 of the Act of 1880, somewhat changed, and of some new provisions, as, for instance, that in verifying the inventory and schedule, the debtor is not required to swear that he has not made any fraudulent preference, etc. The time for meeting of creditors is changed from "not less than thirty days" to "not less than eight nor more than ten." See notes under section 67, *infra*.

The court may adjudge a person insolvent in involuntary proceedings where the insolvent appears with his attorney, on the return day of the order to show cause, without waiting for a meeting of creditors. *Lyon v. Crosby*, 64 Cal. 34.

The finding in an adjudication in involuntary insolvency that the insolvent is indebted to Z. & Co. in a certain sum is sustained, though it appears that the sum so stated is made up of two distinct items arising from different causes, *i. e.*, one for goods sold and the other for money paid out. *In re Abbott*, 74 Cal. 381.

SECTION 14. A copy of the order provided for in section thirteen of this act, shall immediately be published by the clerk of said court in the newspaper designated therein, as often as such newspaper is printed before the meeting of creditors, and upon the filing, at any time before the date set for such meeting, of the schedule required by said section thirteen, a copy of said order shall be served by the clerk forthwith by United States mail, postage prepaid, or personally, on all creditors named in said schedule. If said schedule is not filed prior to the day fixed for the election of an assignee, publication of said order as herein required shall be of itself sufficient notice to the creditors of the time and place appointed for the election of an assignee. No order of adjudication upon creditors' petition shall be entered, unless there be first deposited, in addition to the usual cost of commencing said proceedings, a sum of money sufficient to defray the cost of the publication ordered by the court, and the further sum of five dollars, which is hereby constituted the legal fee of the clerk for the mailing or service of notice to creditors required in this section.

It was provided in section 12 of the Act of 1880, that after failure of the debtor to show cause, or after the issues were found against him, and the schedule and inventory had been filed, the same proceedings should be had as if the debtor had voluntarily filed his petition, *i. e.*, as provided in sections 6, 7, 15, etc., of that act. This section specifically provides the procedure following an adjudication in involuntary proceedings, but it again raises a question as to special procedure in the matter of costs to be deposited. Under the general law, (Stats. 1895, Palm Ed. pp. 268-9) a deposit of five dollars is required upon the commencement of any proceeding (except probate and appeals), and here an additional five dollars is required to be applied to services which are to be rendered by the clerk of the court. The question could probably not be raised as to the cost of publication, but a general law being in existence, regulating costs for clerks' fees, or clerks' services, the requirement of this additional deposit is questioned by some attorneys, for the reason that general laws must have a uniform operation. Art. I, Sec. 11 Const., and because it is a special regulation concerning procedure. Sub. 3, Sec. 25, Art. IV Const., *People v. C. P. R. R.*, 83 Cal. 393. and other cases cited under section 13 *ante*, and in Henning's Constitution, pp. 21-23 and 71-79.

SECTION 15. If, upon such hearing or trial, the issues are found in favor of the respondent, the proceedings shall be dismissed, and the respondent shall recover costs from the petitioning creditors in the same manner as on the final judgment in civil actions.

Same as section 13, Act of 1880.

Costs in civil actions. Secs. 1022, 1024, 1025, 1033 C. C. P.

SECTION 16. In all cases where the debtor resides out of this state, or has departed from the state; or cannot, after due diligence, be found within the state; or conceals himself to avoid service of the order to show cause, or any other preliminary process or orders in the matter; or is a foreign corporation, having no managing or business agent, cashier or secretary within the state upon whom service of orders and process can be made, and it therefore becomes necessary to obtain service of process and order to show cause, as provided in section eleven of this act, then the petitioning creditors, upon submitting the affidavits requisite to procure an order of publication, and presenting a bond in double the amount of the aggregate sum of their claims against the debtor, shall be entitled to an order of court directing the sheriff of the county, or city and county in which the matter is pending, to take into his custody a sufficient amount of property of the debtor to satisfy the demands of the petitioning creditors, and the costs of the proceedings. Upon receiving such order of the court to take into custody property of the debtor, it shall be the duty of the sheriff to take possession of the property and effects of the debtor, not exempt from execution, to an extent sufficient to cover the amount provided for, and to prepare within three days from the time of taking such possession, a complete inventory of all the property so taken, and to return it to the court as soon as completed. The time for taking the inventory and making return thereof may be extended for good cause shown to the court or a judge thereof. The sheriff shall also prepare a schedule of the names and residences of the creditors, and the amount due to each, from the books of the debtor, or from such other papers or data of the debtor available that may come to his possession, and shall file such schedule list of creditors and inventory with the clerk of the court.

This section is new. There was nothing corresponding to it in the past legislation of this state on insolvency, or in the U. S. Bankruptcy Act.

The advantage or advisability of, or the necessity for any particular act of legislation is beyond the scope of the work of the annotator, and the suggestions here made are not intended as criticism.

As the sequestration or attachment here provided for requires bonds to be given in double the value of the property seized, and as the property or its proceeds are to be held for the benefit of all the creditors, the advantage to be gained by, or the inducement for giving the bond is not apparent. It does not appear to be intended that the sheriff can pursue or take any property in possession of, or claimed by third persons or which may have been fraudulently conveyed, or to test the question of fraudulent possession or claim of any third person. It is not presumed that this proceeding is to be regarded as the appointment of a receiver, since, so far as this act is concerned, receivers are only to be appointed when the property of the debtor is incumbered, or disposed of in contravention of this act, and an action or actions are necessary to recover the property. Sec. 67.

If a speedy sale of the property is the end desired, there is serious question as to the right of any court, upon mere filing of a petition and without any service of process whatever, to say nothing of any adjudication or judgment, to seize and sell a man's estate, paying out of it the cost of doing so, and depositing the remainder of the proceeds to await judgment in the case. Perishable property is thus disposed of in some cases because of the necessity of the circumstances. The giving of bonds does not justify the sale of the property before adjudication—this could only be justified by the necessities of the case, as suggested in relation to perishable property. The necessity for pursuing the provisions of the general law by reason of section 11 of article I of the constitution, has been suggested in several notes and it is unnecessary to do more here than say that in so far as this proceeding partakes of attachment, it must be governed by the Code of Civil Procedure. If it is designed as a sequestration, the duties of the sheriff would partake of the duties of a receiver, and under that view it would seem unnecessary to require bond from the creditors, and all of the debtor's property not exempt from execution would be included in the seizure.

SECTION 17. In all cases where property is taken into the custody of the sheriff, as provided in the preceding section, if the property taken into custody by the sheriff does not embrace all the property and effects of the debtor not exempt from execution, any other creditor or creditors of the debtor, upon giving bond in double the amount of their claims, singly or jointly, shall be entitled to similar orders, and to like action by the sheriff, until all claims be provided for, if there be sufficient property or effects. All property taken into custody by the sheriff, by virtue of the giving of any such bonds, shall be held by him for the benefit of all creditors of the debtor, whose claims shall be duly proved, and as provided in this act. The bonds provided for in this and the preceding section to procure the order for custody of the property and effects of the debtor, shall be conditioned that if, upon final hearing of the petition in insolvency, the court shall find in favor of the petitioners, such bonds and all of them shall be void; if the decision be in favor of the debtor, the proceedings shall be dismissed, and the debtor, his heirs, administrators, executors, or assigns shall be entitled to recover such sum of money as shall be sufficient to cover the damages sustained by him, not to exceed the amount of the respective bonds, in any court having jurisdiction of the subject and the parties; *provided*, that if either the petitioners or the debtor shall appeal from the decision of the court, upon final hearing of the petition the appellant shall be required to give bond to the successful party in a sum double the amount of the value of the property in controversy and for the costs of the proceedings. Any person interested in the estate may except to the sufficiency of the sureties on such bond, or bonds. When excepted to, the petitioner's sureties, upon notice to the person excepting of not less than two nor more than five days, must justify before a judge or



county clerk in the same manner as upon bail on arrest; and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the clerk or judge shall issue an order vacating the order to take the property of the debtor into the custody of the sheriff.

See notes under section 16.

SECTION 18. If in any case, proper affidavits and bonds are presented to the court, or a judge thereof, asking for and obtaining an order of publication, and an order for the custody of the property of the debtor, as provided in sections sixteen and seventeen of this act, and thereafter the petitioners shall make it appear satisfactorily to the court, or a judge thereof, that the interest of the parties to the proceedings will be subserved by a sale thereof, the court may order such property to be sold, in the same manner as property is sold under execution, the proceeds to be deposited in the court, to abide the result of the proceedings.

## ARTICLE IV.

### ASSIGNEES.

SECTION 19. At a meeting of the creditors in open court, those being entitled to vote, as provided by section eight, shall proceed to the election of one assignee. In electing an assignee, the opinion of the majority in amount of claims shall prevail. The clerk of the court shall keep a minute of the deliberations of said creditors, and of the election and appointment of an assignee, and enter the same upon the records of the court. The assignee shall file, within five days, unless the time be extended by the court, with the clerk, a bond, in an amount to be fixed by the court, to the state of California, with two or more sufficient sureties, approved by the court, and conditioned for the faithful performance of the duties devolving upon him. The bond shall not be void upon the first recovery, but may be sued upon from time to time by any creditor aggrieved, in his own name, until the whole penalty be exhausted. The sureties on such bond may be required to justify, upon the application of any party interested, in the same manner as bail upon arrest in civil cases.

Section 15 of the Act of 1880, provided that at a meeting of creditors, in open court, "those having proven their claims, by filing a verified statement showing the amount, nature, and security, if any, shall proceed," etc. That section also provided that the assignee should be a resident of the county in which the petition was filed.

The creditors and the debtor alone are interested in the amount and sufficiency of the bond of the assignee. *Fitzgerald v. Neustadt*, 91 Cal. 603. *Luhrs v. Kelly*, 67 Cal. 291.

Only the creditors are authorized to sue on the assignee's bond.

The debtor and the creditors are the only persons interested in the amount and sufficiency of the bond. The assignee acts only in a private capacity, and if he takes and converts property

not belonging to the estate, he is a trespasser, but for such acts his sureties are not liable. *Best v. Johnson*, 78 Cal. 217.

If the creditors do not object to the bond of the assignee, a debtor of the insolvent cannot raise such objection in a suit by the assignee to recover the debt. *Mogk v. Peterson*, 75 Cal. 496.

The duties of the assignee are prescribed in sections 18, 21, 25, 29, 34 of the act. The bond he gives is conditioned upon the performance of these duties, and the conversion by him, as assignee, of property not belonging to the estate of the insolvent does not render his sureties liable to the owner of the property. *Best v. Johnson*, 78 Cal. 217.

[Sections 18, 21, 25, 29 and 34 of the Act of 1880, correspond to sections 22, 25, 29, 33 and 38 of the present act.]

SECTION 20. If, on the day appointed for the meeting, creditors do not attend, or refuse to elect an assignee; or if, after election, the assignee shall fail to qualify within the proper time, or if a vacancy occurs by death or otherwise, it shall be lawful for the court to appoint an assignee and fix the amount of his bond.

SECTION 21. As soon as an assignee is elected or appointed and qualified, the clerk of the court shall, by an instrument under his hand and seal of the court, assign and convey to the assignee all the estate, real and personal, of the debtor, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in insolvency, and shall relate back to the acts upon which the adjudication was founded, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process, as the property of the debtor, and shall dissolve any attachment made within one month next preceding the commencement of the insolvency proceedings. Such assignment shall operate to vest in the assignee all of the estate of the insolvent debtor not exempt by law from execution. Whenever such assignment shall dissolve an attachment as herein provided, it shall also vacate any judgment made or entered, and dissolve and set aside any execution levied in any action or proceeding against the debtor commenced subsequently to the action in which the attachment is dissolved.

This section corresponds to section 17 of the Act of 1880. That the assignment shall "relate back to the acts upon which the adjudication was founded" is new, and bears out the suggestion as to the necessity for specific findings in the order of adjudication, or accompanying it; for there is quite a diversity as to the time within which different acts are declared to constitute an act of insolvency—three to thirty days. (Sec. 9.) The finding will therefore determine the acts, back to which the assignment will relate.

The closing sentence of this section, vacating any judgment and setting aside any execution, given or levied in an action

commenced subsequent to the action in which the attachment is dissolved, is also new.

The proceedings in involuntary insolvency are *in rem* or *quasi in rem*. They are proceedings by creditors to establish their several claims against the property to which alone they can look for payment. The assignee is but the hand of the court, and though elected by the creditors, derives his powers from, and discharges his duties under direction of the court, and for the purposes of the proceedings is an officer of the court. The insolvent practically disappears as a party to the proceedings, and only the execution of the trust remains. *Rued v. Cooper*, 34 Pac. Rep. 98.

The order of the court, upon default of the debtor, or after trial upon the issues in the proceeding, and the order of adjudication of insolvency have relation to the time when the petition was filed and render void any intervening transfer or incumbrance of the debtor's property, and the jurisdiction thus acquired cannot be divested by subsequent proceedings under section 601 Political Code. *State I. & I. Co. v. San Francisco*, 101 Cal. 135.

Under the Act of 1852, it was held that the assignee of the insolvent becomes vested with the title to all of the insolvent's property, even if it is not mentioned in the schedule, and although the assignee does not know of its existence until after the discharge of the insolvent. (See statement of facts of the case.) *Poehlmann v. Kennedy*, 48 Cal. 201.

The title to the property passes to the assignee (excepting exempt property) whether contained in the schedule or not. *Rued v. Cooper*, 34 Pac. Rep. 98.

The declaration of section 17, Act of 1880, that attachments levied within one month prior to commencing proceedings are dissolved, is equivalent to an express declaration that other liens are not affected. *Vermont Marble Co. v. Superior Court*, 99 Cal. 579.

No title passes by the instrument of assignment where the court has not obtained jurisdiction in the insolvency proceeding, but when properly made, the assignment takes effect by relation, at the time the petition is filed. *Hastings v. Cunningham*, 39 Cal. 187.

The clerk in executing an assignment of the property of the insolvent named himself as party of the first part, and after reciting the insolvency proceedings, proceeds to grant, assign, transfer and set over unto the party of the second part all the property, estate and effects of *said party of the first part*, *Held*, that the

entire instrument is sufficient to show an assignment of the estate of the insolvent. *Mogk v. Peterson*, 75 Cal. 496.

In an action against the sheriff to recover personal property taken by him under attachment, his answer that the property had been transferred to plaintiff with intent to defraud creditors, with plaintiff's knowledge, by one who has since been adjudged a bankrupt, and that upon demand of the assignee in bankruptcy he had surrendered the property to the latter, sets up a good defense. *Bolander v. Gentry*, 36 Cal. 105.

Attachments levied within four months of proceedings in bankruptcy were dissolved by the adjudication, and *Held*, that where a garnishment had been made prior to the bankruptcy proceedings within four months, and a judgment subsequently acquired and execution issued but not collected, the judgment and execution did not create a lien or extend the lien of the attachment. The attachment is but a *mesne* process. If the money had been paid to the sheriff on execution, which is a *final* process, before the bankruptcy proceedings, he might have applied it after those proceedings were instituted. But see *queare* in concurring opinion of Wallace, J. *Howe v. Union Insurance Co.*, 42 Cal. 529.

Section 6 of the Act of 1876, (Stats. p. 581) amended section 34 of Act of 1852-3 (Stats. p. 321) by declaring that in voluntary proceedings, attachments levied within two months prior, were dissolved by the adjudication in insolvency. *Held*, that the manner of amending by supplementary act without publishing the law in full as amended, was not unconstitutional, and such attachments were dissolved by force of the act. *Baum v. Raphael*, 57 Cal. 361.

The mere filing of a petition in involuntary insolvency does not operate to dissolve an attachment, and is not ground for dissolution thereof; and the fact that the plaintiff in the attachment suit is uniting with the other creditors in prosecuting the insolvency proceedings is not ground for such dissolution. The showing made is insufficient. *Bertz v. Turner*, 102 Cal. 672.

The Insolvent Act must receive a reasonable construction, in order to effectuate its object and promote justice. It is designed to protect creditors, and not give an advantage to their detriment. Where the insolvent had given a chattel mortgage which was not recorded, and the mortgaged property was attached in the hands of the insolvent within one month prior to insolvency proceedings, the attachment was dissolved and the property should go to the assignee in insolvency. The dissolution of the attachment could not result in any advantage to the mortgagee who had neg-

lected to record his mortgage. *Beamer v. Freeman*, 84 Cal. 545.

*U. S. Supreme Court Decisions.*

While it is true that the transfer, when made to the assignee relates back to the time of the commencement of the proceedings, yet the instrument of assignment can have no effect prospectively nor retrospectively until it is actually executed, and the insolvent or bankrupt remains vested with the title to his estate, real and personal, until the assignment is executed.

A decree in bankruptcy alone does not have the effect of divesting the bankrupt's estate. *Hampton v. Rouse*, 22 Wall 263; Law Ed. 22, 755.

And assignees are not obliged to accept property of a character that will be burdensome rather than profitable to the estate. *American File Co. v. Garrett*, 110 U. S. 288; Law Ed. 28, 149.

Powers of revocation and appointment do not pass to the assignee in bankruptcy. *Jones v. Clifton*, 101 U. S. 225; Law Ed. 25, 908; *Brandies v. Cochrane*, 112 U. S. 344; Law Ed. 28, 760.

Stocks purchased with wife's separate property years before the husband's bankruptcy, do not pass to the assignee. *Glover v. Love*, U. S.; Law Ed. 26, 657.

Under a separate commission in bankruptcy against one partner, the assignee succeeds only to his private property and to his interest in the partnership property subject to the claims of the other partners as they existed before the bankruptcy. *Harrison v. Sterry*, 5 Crauch 289; Law Ed. 3, 104.

The effect of the assignment to the assignee in bankruptcy is to transfer such title and right as the bankrupt had when the proceeding in bankruptcy was instituted.

If property of the debtor, levied on under an attachment within four months previous, has been sold prior to the filing of the petition in bankruptcy, the rights of the assignee attach to the money, and cannot follow the property sold. *Connor v. Long*, 104 U. S. 228; Law Ed. 26, 723.

And the right of an underwriter to compensation under an abandonment passes to his assignee. *Comegys v. Vasse*, 1 Pet. 193; Law Ed. 7, 108.

So with choses in action whether good or bad, collectable or uncollectable, of the bankrupt. *First Nat. Bank v. Cook*, 97 U. S. 415; Law Ed. 24, 916.

And where property became vested in the assignee under an assignment for the benefit of creditors more than two years before bankruptcy, it cannot be subjected to the administration

of the assignee in bankruptcy. If such property was subject to the claims of creditors, the first assignment operated to convey it, and if not so subject it could not pass to the assignee in bankruptcy. *Spindle v. Shreve*, 111 U. S. 542; Law Ed. 28, 512.

The assignee has no interest in property or income therefrom which is subject to a devise over in the event of bankruptcy. *Nichols v. Eaton*, 91 U. S. 716; Law Ed. 23, 254. And what may come to the bankrupt devisee after his bankruptcy under the discretion reposed in the trustee cannot be reached by his assignee. *Id.*

The assignee takes the title, subject to valid existing equities, liens and incumbrances, (not created of course, by any of the acts prohibited by the statute) whether created by operation of law or by act of the bankrupt. *Cook v. Tullis*, 18 Wall. 332; Law Ed. 21, 933; *Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 76; Law Ed. 24, 589; *Stewart v. Platt*, 101 *id.* 73; Law Ed. 25, 816.

The assignee takes as a purchaser, with notice of all outstanding rights and equities. *Dudley v. Easton*, 104 U. S. 99; Law Ed. 26, 668.

Proceedings in bankruptcy were held not to divest an attachment lien created by a levy, more than four months prior to the bankruptcy proceedings, and the property so levied upon could be sold under execution subsequently issued in the case, the attachment being issued out of a state court. *Davis v. Friedlander*, 104 U. S. 570; Law Ed. 26, 818; *Valliant v. Childress*, 21 Wall. 642; Law Ed. 22, 549.

And see *Vermont Marble Co. v. Superior Court*, 99 Cal. 579, *neretofore cited*.

Where the defendant, in foreclosure proceedings becomes a bankrupt, the assignee takes the title by the assignment, subject to the foreclosure, and his rights are foreclosed by the decree. *Eyster v. Gaff*, 91 U. S. 521; Law Ed. 23, 403.

The assignee acquires only the interest and estate of the bankrupt as it existed at the time of the decree in bankruptcy, and the deed of the assignee can vest nothing more in a purchaser than he acquired by the assignment. *Cleveland Ins. Co. v. Reed*, 24 How. U. S. 284; Law Ed. 16, 686; *Gifford v. Helms*, 98 U. S. 248; Law Ed. 25, 57.

If the bankrupt himself becomes such purchaser, he acquires thereby only the same interest or estate that had passed from himself to the assignee. *Roby v. Colehour*, 146 U. S. 153; Law Ed. 36, 922.

The bankrupt himself after adjudication and before he has

been discharged, may become a purchaser at assignee's sale. His earnings subsequent to the adjudication and surrender of his property are his own, and he may use his exempted property to purchase part of the surrendered estate. *Traer v. Clews*, 115 U. S. 528; Law Ed. 29, 467.

Money awarded to the bankrupt under a claim against the United States, should go to the assignee in preference to a receiver previously appointed in a creditors' suit against the debtor. *Booth v. Clark*, 17 How. U. S. 322; Law Ed. 15, 164.

Only the defeasable title of a fraudulent vendee passes to his assignee in bankruptcy. *Donaldson v. Farwell*, 93 U. S. 631; Law Ed. 23, 993.

SECTION 22. The assignee shall have the right to recover all the estate, debts and effects of said insolvent. If, at the time of the commencement of proceedings in insolvency, an action is pending in the name of the debtor, for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall be allowed and admitted to prosecute the action, in like manner and with like effect as if it had been originally commenced by him. If there are any rights of action in favor of the insolvent for damages, on any account, for which an action is not pending, the assignee shall have the right to prosecute the same with the same effect as the insolvent might have done himself if no proceedings in insolvency had been instituted. If any action or proceeding at law, or in equity, in which the insolvent is defendant is pending at the time of the adjudication, the assignee may defend the same, in the same manner and with like effect as it might have been defended by the insolvent. In suit prosecuted or defended by the assignee, a certified copy of the assignment made to him shall be conclusive evidence of his authority to sue or defend.

The first clause of this section embodies section 18 of the Act of 1880, and is practically the same as the provision of the Bankruptcy Act (Rev. Stats., Sec. 5047).

The assignee shall have the like remedy to recover all the estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If at the time of the commencement of the proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. And if any suit at law or in equity, in which the bankrupt is a party in his own name, is pending at the time of the adjudication of bankruptcy, the assignee

may defend the same in the same manner and with the like effect as it might have been defended by the bankrupt.

The remainder of the section, "If there are any rights of action in favor of the insolvent for damages on any account," etc., is new, and is designed, presumably, to carry forward the provisions of sections 3 and 4, requiring an outline of rights of action to be set forth in the schedule and inventory.

There is, however, a distinction to be made as to "rights of action." Some are assignable and some are not. It is not to be supposed that the assignee succeeds to the right to prosecute, nor the liability to defend purely "personal" actions, such as libel or slander or seduction. Such rights as go to an administrator, and the defense of such actions as would affect the estate, go likewise to the assignee. Actions "arising out of contract" and statutory rights and liabilities are assignable and affect the estate, and these, were generally considered as embraced in the former Insolvency Act and the Bankruptcy Act.

Where property was attached four months before filing a petition in bankruptcy, the plaintiff, if he recovers judgment in the action, is entitled to the enforcement of his attachment lien, and the fact that the property was released from attachment by an undertaking, will not deprive plaintiff of that right, but will entitle him to the benefit of the undertaking as a substitute for the property, and a judgment so providing is proper. *Holliday v. Hare*, 69 Cal. 515.

In an action by the assignee to recover property belonging to the insolvent, where no fraudulent transfer is alleged, evidence that defendant was the mother of the insolvent, and that he turned over to her certain property "needed for his family," and that she had told him to turn over "what was most needed for his family," does not tend to show a fraudulent transfer, but tends to prove that there was no transfer, but a mere pretense of transfer, and such evidence is relevant to prove ownership of the property by the insolvent—not by the defendant. *Cady v. Leonard*, 81 Cal. 622.

The assignee of an insolvent corporation may maintain attachment proceedings against non-resident subscribers to stock, for the whole amount subscribed and unpaid, when it appears that the whole amount would not be more than sufficient to meet the indebtedness of the corporation. *Kohler v. Agassiz*, 99 Cal. 9.

The bankrupt is not a necessary party to a bill filed by the assignee to recover property fraudulently conveyed by the former. *Buffington v. Harvey*, 95 U. S.; 99 Law Ed., 24, 381.



And the assignee may be substituted in the appellate court in an action where his assignor has been discharged subsequent to the case being taken up. *Gates v. Goodloe*, 101 U. S. 612; Law Ed. 25, 895. See Cal. C. C. P., Secs. 369, 385, 386, 387. Ins. Act 1880, Sec. 21. See citations under sections 25 and 31 *ante*.

SECTION 23. The assignee shall, within one month after the making of the assignment to him, cause the same to be recorded in every county, or city and county, within this state, where any lands owned by the debtor are situated, and the record of such assignment, or a duly certified copy thereof, shall be conclusive evidence thereof in all courts. If the schedule and inventory required by this act have not been filed by the debtor, the assignee shall, within one month after his election, prepare and file such schedule and inventory from the best information he can obtain; and shall thereupon serve notice by United States mail, postage prepaid, or personally, on all creditors named in such schedule, whose claims have not been filed, to forthwith prove their demands.

The first half of this section corresponds to section 19 of the Act of 1880. The latter half, relating to the inventory and notice to creditors, was only partially provided for by section 14 of the Act of 1880.

SECTION 24. Any assignee may, at any time, by writing filed in court, resign his appointment, having first settled his accounts, and delivered up all the estate to such successor as the court shall appoint; *provided*, that if, in the discretion of the court, the circumstances of the case require it, upon good cause being shown, the court may, at any time before such settlement of account and delivery of the estate shall have been completed, revoke the appointment of such assignee and appoint another in his stead. The liability of the outgoing assignee, or of the sureties on his bond, shall not be in any manner discharged, released, or affected by such appointment of another in his stead.

This section is the same as section 20 of the Act of 1880.

SECTION 25. The said assignee shall have power:

1. To sue in his own name and recover all the estate, debts, and things in action, belonging or due to such debtor, and no set-off or counter claim shall be allowed in any such suit for any debt, unless it was owing to such creditor by such debtor at the time of the adjudication of insolvency.

2. To take into his possession all the estate of such debtor except property exempt by law from execution, whether attached or delivered to him, or afterward discovered, and all books, vouchers, evidence of indebtedness, and securities belonging to the same.

3. In case of a non-resident, absconding, or concealed debtor, to demand and receive of every sheriff who shall have attached any of the property of such debtor, or who shall have in his possession any moneys arising from the sale of such property, all such property and moneys, on paying him his lawful costs and charges for attaching and keeping the same.

4. From time to time to sell at public auction all the estate, real and personal, vested in him as such assignee, which shall come to his possession and as ordered by the court.

5. On such sales to execute the necessary conveyances and bills of sale.

6. To redeem all valid mortgages and conditional contracts, and all valid pledges of personal property; and to satisfy any judgments which may be an incumbrance on any property sold by him, or to sell such property, subject to such mortgage, contracts, pledges, or judgments.

7. To settle all matters and accounts between such debtor and his debtors, subject to the approval of the court.

8. Under the order of the court appointing him, to compound with any person indebted to such debtor, and thereupon to discharge all demands against such person.

9. To have and recover from any person receiving a conveyance, gift, transfer, payment, or assignment, made contrary to any provision of this act, the property thereby transferred or assigned; or in case a re-delivery of the property cannot be had, to recover the value thereof, with damages for the detention.

This section is the same as section 21 of the Act of 1880.

Where the creditors furnish the consideration for purchase of property at assignee's sale and their attorney buys in the property, to be held by him until a more advantageous sale can be made thereof, a resulting trust is created under section 853 Civil Code, and it is immaterial whether the agreement so to act is reduced to writing or whether the property is real or personal, and the attorney cannot take advantage of a defect in the insolvency proceedings invalidating the deed to the assignee. In an action to enforce the trust, the creditors and their successors in interest are proper plaintiffs and the trustee and purchasers and incumbrancers under him are proper defendants. *Broder v. Conklin*, 77 Cal. 330.

To a complaint by the assignee against the insolvent to recover property alleged to belong to the insolvent's estate, and which the insolvent still holds and refuses to surrender to the assignee, the latter answered disclaiming any right or title to the property, denying that he ever owned it and denying that he ever refused to turn it over, or that he is in possession or entitled to possession. *Held*, the answer raised material issues and plaintiff was not entitled to judgment on the pleadings for possession. If the answer was true, judgment should have been that plaintiff take nothing and that defendant recover costs. *Martin v. Porter*, 84 Cal. 476.

That an insolvent debtor may, when there is no bankrupt or insolvent law making a different disposition of his property, lawfully devote it to the payment of any creditor, or a part of his creditors, to the exclusion of others, is thoroughly settled by

numerous well considered decisions. And while it is true that in this state, under section 55, of the Act of 1880, a conveyance made and accepted with such an intent may be set aside by an assignee in insolvency proceedings by or against the grantor, still, subject to the right thus given the assignee in insolvency to defeat it, such a conveyance is unassailable. *Priest v. Brown* 100 Cal. 627-631. But compare *Tapscott v. Lyon*, 103 Cal. 297, and *Cady v. Leonard*, 81 Cal. 622.

The right of action to recover moneys paid on "margin" contracts for sale of stocks under section 26, article 4, constitution, passes to the assignee in insolvency, although it was not included in the insolvent's schedule of assets. And although the court has settled the accounts of the assignee and discharged him, upon subsequent discovery of such assets, the court should re-assume its jurisdiction of the subject matter and entertain the suit of the assignee to recover such assets. *Rued v. Cooper*, 34 Pac. Rep. 98. (Cal.)

It was held that a franchise for a toll-road did not pass to an assignee in bankruptcy, but where the bankrupt voluntarily surrendered the road and franchise, and the assignee sold the same, and the supervisors, the grantors of the franchise, assented to the transfer and authorized the purchaser to collect tolls, *Held*, that though the franchise, being a trust, did not pass to the assignee, nor to the purchaser, yet the whole transaction constituted a transfer of it by the owner with the consent of the granting power. *People v. Duncan*, 41 Cal. 507.

#### *U. S. Supreme Court Decisions.*

Money previously paid to a creditor of a partnership, if recoverable, can only be recovered by the assignee of the partnership and not by the assignee of an individual bankrupt partner. *Amsuick v. Bean*, 22 Wall, 395, Law Ed. 22, 801.

The assignee need not proceed to sell mortgaged property where the property is worth less than the amount of the mortgage. *McHenry v. Societe Francaise*, 95 United States 58, Law Ed. 24, 370.

The assignee may maintain an action in equity to remove a cloud upon the property coming into his hands under the assignment, and may have injunction in aid of such suit. *Chapman v. Brewer*, 114 United States 158, Law Ed. 29, 83.

The assignee represents the unsecured creditors as distinguished from those whose debts are secured. *Dudley v. Easton*, 104 United States 99; Law Ed. 26, 668.

The assignee of a corporation represents the corporation and

its creditors, and the defense of irregular organization cannot be urged against him. *Chubb v. Upton*, 95 United States 665; Law Ed. 24, 523.

Under the United States Bankruptcy Act, all sales of property of the bankrupt were required to be made at public auction. When a sale is made under a power given by statute, all the requirements of such statute, so far as there are conditions precedent to the operation of the power to vest the estate, must appear to have been complied with. *Reid v. Robrecht*, 102 Cal. 520.

Where the assignee sells goods on which there is a lien for rent, the lien holder may recover from him the full value of the goods, (limited to the amount of the lien) and costs. *Marshall v. Knox*, 16 Wall 551; Law Ed. 21, 481.

The measure of damages in suit to recover for property of the bankrupt improperly sold under execution, is the value of the property seized and sold. *First Nat. Bank v. Jones*, 21 Wall 325; Law Ed. 22, 542; C. C. Cal. Sec.

For cases sustaining the right of the assignee in bankruptcy, to pursue and sue for recovery of property conveyed in fraud of the statute, and to have conveyances or incumbrances fraudulently created set aside, see *First Nat. Bank v. Jones*, 21 Wall 325; Law Ed. 22, 542; *Michaels v. Post*, *Id.* 398; *Id.* 520; *Fox v. Gardner*, *Id.* 475; *Id.* 685; *Massey v. Allen*, 17 *id.* 351; *id.* 21, 542; *Traders Nat. Bank v. Campbell*, 20 *id.* 87; *id.* 20, 832; *Smith v. Mason*, 14 *id.* 419; *Id.* 748; *Phipps v. Sedgwick*, 95 U. S. 3; *id.* 24, 591; *Connor v. Long*, 104 U. S. 228; *id.* 26, 723.

The mere right to commence an action for fraud practiced upon the assignee is not assignable, but where property is conveyed by the assignee, the fact that the grantee may be compelled to bring a suit to enforce his right to the property, does not render the conveyance void. *Traer v. Clews*, 115 U. S. 528; Law Ed. 29, 467.

Where an assignee refuses to proceed in a proper case, the court may compel him to proceed or remove him. *Glenny v. Langdon*, 98 U. S. 20; Law Ed. 25, 43.

SECTION 26. The insolvent shall, either before or on the day appointed for the meeting of creditors, deliver to the court all the commercial or account books he may have kept, which books shall be deposited in the clerk's office of said court. Said insolvent shall also deliver to the court at the same time, all vouchers, notes, bonds, bills, securities, or other evidences of debt, in any manner relating to or having any bearing upon or connection with the property surrendered by said debtor; and all such papers or securities shall be deposited in the clerk's office of said court, and the

clerk shall hand them over, together with the books of the insolvent, to the assignee who may be appointed.

This section is the same as 22 of the Act of 1880.

The failure of a merchant or tradesman, subsequent to the passage of this act, to keep proper books of account, is made cause for refusing a discharge. Section 53, *infra*, and notes.

The failure of the insolvent to deposit with the clerk, on or before the day fixed for the meeting of creditors, all his commercial or other books of account, or account for their loss, was held *prima facie* evidence of fraud to the injury of his creditors. *Schloss v. His Creditors*, 31 Cal. 201.

The insolvent must turn over his books. The language of the Act of 1852 is, "the books he may have kept," and the books he may happen to have at the date of filing his petition will not satisfy this requirement. The fact that he had sold his books a short time before filing his petition was not sufficient to cause a dismissal of his proceedings. He should first be required by order to produce and turn over his books within a reasonable time. *Moore v. His Creditors*, 19 Cal. 691.

SECTION 27. If any person, before the assignment is made, having notice of the commencement of proceedings in insolvency, or having reason to believe that insolvency proceedings are about to be commenced, embezzles or disposes of any of the moneys, goods, chattels, or effects of the insolvent, he is chargeable therewith, and liable to an action by the assignee for double the value of the property so embezzled or disposed of, to be recovered for the benefit of the estate.

The words, "or having reason to believe that insolvency proceedings are about to be commenced," have been added. Otherwise this section is the same as 23 of the Act of 1880.

An action for embezzlement does not lie in favor of an assignee against petitioning creditors of the insolvent, for money received by them in consideration of their not bidding at a constable's sale of the insolvent's effects, such sale being had under an execution levied prior to the filing of the petition in insolvency. Such money was not a part of the insolvent's estate. The agreement not to bid was against public policy and wholly void, and no action would lie between the parties to said transaction to recover under or enforce the same. *Crawford v. Maddux*, 100 Cal. 222.

SECTION 28. The same penalties, forfeitures, and proceedings by citation, examination, and commitment, shall apply on behalf of an assignee against persons suspected of having concealed, embezzled, conveyed away, or disposed of any property of the debtor, or of having possession or knowledge of any deeds, conveyances, bonds, contracts, or other writings

which relate to any interest of the debtor in any real or personal estate, as provided in the case of estates of deceased persons in sections one thousand four hundred and fifty-nine, one thousand four hundred and sixty, and one thousand four hundred and sixty-one of the Code of Civil Procedure.

This section is the same as 24 of the Act of 1880.

SECTION 29. The assignee shall as speedily as possible convert the estate, real and personal, into money. He shall keep a regular account of all moneys received by him as assignee, to which every creditor or other person interested therein may, at all reasonable times, have access. No private sale of any property of the estate of an insolvent debtor shall be valid unless made under the order of the court, upon a petition in writing, which shall set forth the facts showing the sale to be necessary. Upon filing the petition, notice of at least ten days shall be given by publication and mailing, in the same manner as is provided in section seven of this act. If it appears that a private sale is for the best interests of the estate, the court shall order it to be made.

This section is the same as 25 of the Act of 1880.

Sale of the bankrupt's property may be made "free of encumbrance" in proper cases, but creditors must be duly notified. Sale of the bankrupt's interest merely may be made without such notice. *Ray v. Norsworthy*, 23 Wall 128; Law Ed. 23, 116.

The expenditures of the purchaser at a bankrupt's sale, in payment of taxes, discharging prior liens, and such as were otherwise necessary to prevent deterioration and loss, should be first paid out of a mortgage sale, and the purchaser should account for rents and profits, if there are any. *Factor, e'tc., Ins. Co., v. Murphy*, 111 United States 738; Law Ed. 28, 582.

SECTION 30. In all cases where there has been personal service of the order to show cause, or voluntary appearance after order of publication, when it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or is liable to deteriorate in value, or is disproportionately expensive to keep, the court may order the same to be sold in such manner as may be deemed most expedient, under the direction of the sheriff, receiver, or assignee, as the case may be, who shall hold the funds received in place of the property sold until further order of the court.

The words "in all cases where there has been personal service of the order to show cause or voluntary appearance after order of publication," have been added; also "receiver" has been included with sheriff or assignee. Otherwise the section is the same as 26, of the Act of 1880.

SECTION 31. Outstanding debts, or other property due or belonging to the estate, which cannot be collected and received by the assignee without

unreasonable or inconvenient delay or expense, may be sold and assigned in like manner as the remainder of the estate. If there are any rights of action for damages in favor of the insolvent prior to the commencement of the insolvency proceedings, the same may, with the approval of the court, be compromised.

The last sentence, "If there are any rights of action," etc., has been added; otherwise this section is the same as 27 of the Act of 1880.

SECTION 32. Assignees shall be allowed all necessary expenses in the care, management and settlement of the estate, and shall be entitled to charge and receive for their services commissions upon all sums of money coming to their hands and accounted for by them, as follows: For the first thousand dollars, at the rate of seven per cent.; for all above that sum and not exceeding ten thousand dollars, at the rate of five per cent.; and for all above that sum at the rate of four per cent.; *provided, however*, that if the person acting as assignee was receiver of the property of the estate pending the election of an assignee, any compensation allowed him as such receiver shall be deducted from the compensation to which he otherwise would be entitled as such assignee.

The *proviso*, "that if the person acting as assignee was receiver," etc., has been added; otherwise the section is the same as 28 of the Act of 1880.

The assignee in insolvency proceedings which were declared void, is nevertheless, entitled to be allowed for all reasonable and proper expenses incident to his taking or management of the property while he was acting under the direction and authority of the court. *Adams v. Haskell*, 6 Cal. 476.

SECTION 33. At the expiration of three months from the appointment of the assignee in any case, or as much earlier as the court may direct, a time and place shall be fixed by the court at which the assignee shall exhibit to the court and to the creditors, and file just and true accounts of all his receipts and payments, verified by his oath, and the statement of the property outstanding, specifying the cause of its outstanding, also what debts or claims are yet undetermined, and stating what sum remains in his possession, and shall accompany the same with an affidavit that notice by mail has been given to all creditors named in the schedule filed by the debtor or the assignee, that said accounts will be heard at a time specified in such notice, which time shall not be less than ten nor more than fifteen days from the filing of such accounts. At the hearing the court shall audit the accounts, and any person interested may appear and file exceptions thereto and contest the same, and thereupon the court may order a dividend paid to those creditors whose claims have been proven and allowed. Thereafter, further accounts, statements, and dividends shall be made in like manner as often as occasion requires; *provided, however*, that it shall be the duty of the assignee to file his final account within one year from the date of the order of adjudication, unless the court, after notice to creditors, shall grant further time, upon a satisfactory showing that great loss and waste

would result to the estate by reason of the conversion of the property into money within said time, or that it has been impossible to do so by reason of litigation.

This section is mostly new. Section 29 of the Act of 1880, did not require the time and place to be "fixed by the court" at which the accounts should be exhibited, nor provide for the filing of objections, nor make it the duty of the assignee to file his final account within one year, etc.

An order settling the account of an assignee and directing him to pay to creditors the amount in his hands has the effect of a judgment and draws legal interest, and the appellate court may, if it finds the appeal from such order frivolous or intended for delay, make an additional allowance by way of damage. *Matter of Sharp*, 92 Cal. 577.

An order setting aside a former order settling the account of an assignee, which had been reported upon by a referee appointed in an action by creditors in involuntary proceedings to set aside a conveyance as fraudulent, is not a "final judgment," nor a "special order made after final judgment" within the meaning of section 939 C. C. P., and is not appealable. *Echtebarne v. Roeding*, 89 Cal. 517.

On appeal from an order settling the final account of an assignee in insolvency, a paper embodied in the transcript, certified by the trial judge as containing an abstract of the evidence given on hearing of settlement of the account of the assignee, is not a part of the record and will not be considered. *Estate of Tanner*, 70 Cal. 22.

SECTION 34. The court shall at any time, upon the motion of any two or more creditors, require the assignee to file his account in the manner and upon giving the notice specified in the preceding section, and if he has funds subject to distribution, he shall be required to distribute them without delay.

This section would be the same as 30 of the Act of 1880, but for the addition of the words "in the manner and upon giving the notice specified in the preceding section."

An order directing the assignee for the benefit of creditors to render an account in pursuance of section 28, of Insolvent Act is not appealable. The court can order such account as often as it appears proper. *Rosenthal, Feder & Co. v. Levy*, 73 Cal. 9.

SECTION 35. All creditors whose debts are duly proved and allowed shall be entitled to share in the property and estate *pro rata* without priority or preference whatever, other than as provided in this act and in section one thousand two hundred and four of the Code of Civil Procedure; *provided*,



that any debt proved by any person liable as bail, surety, guarantor, or otherwise, for the debtor, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable; and the share to which such debt would be entitled may be paid into court, or otherwise held, for the benefit of the party entitled thereto, as the court may direct.

This section is the same as 31 of the Act of 1880.

*Priority in favor of United States.*

The nature of the priority in favor of the United States is a mere right of prior payment out of the general funds of the debtor in the hands of the assignee, and they are personally liable if they fail to pay the debt. *Conard v. Atlantic Ins. Co.*, 1 Pet. 386; Law Ed. 7, 189.

Mere inability of the debtor to pay all his debts is not an "insolvency" within the statute giving priority to the United States. *Id.* *Prince v. Bartlett*, 8 Cranch 431; Law Ed. 3, 614; *Field v. U. S.*, 9 Pet. 182; Law Ed. 9, 94.

Debts due the United States from the estate of an insolvent debtor or bankrupt are in all cases entitled to priority of payment. *United States v. Fisher*, 2 Cranch 358; Law Ed. 2, 304.

SECTION 36. Whenever any dividend has been duly declared, the distribution of it shall not be stayed or affected by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors, before any further dividend is made to the latter; *provided*, the failure to prove such claim shall not have resulted from his own neglect.

This section is substantially the same as 32 of the Act of 1880. A slight change in phraseology occurs in the first line only.

Where an estate is insolvent, whenever some of the creditors are paid part of their claims, a like proportion should be paid into court to await the final determination of claims then being litigated. *Estate of Sigourney*, 61 Cal. 71.

SECTION 37. Should the assignee refuse or neglect to render his accounts as required by sections thirty-three and thirty-four of this act, or pay over a dividend when he shall have, in the opinion of the court, sufficient funds for that purpose, the court shall immediately discharge such assignee from his trust, and shall have power to appoint another in his place. The assignee so discharged shall forthwith deliver over to the assignee appointed by the court, all the funds, property, books, vouchers, or securities belonging to the insolvent, without charging or retaining any commission or compensation for his personal services.

This section is the same as 33 of the Act of 1880, with the exception that the reference to other sections is changed to correspond to the numbers employed in the present act.

SECTION 38. Preparatory to the final account and dividend, the assignee shall submit his account to the court, and file the same, and shall at the time of filing, accompany the same with an affidavit that a notice by mail has been given to all creditors who have proved their claims, that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time specified in such notice, which time shall not be less than ten or more than twenty days from such filing. At the hearing, the court shall audit the account, and any person interested may appear and file exceptions in writing, and contest the same. The court thereupon shall settle the account, and order a dividend of any portion of the estate remaining undistributed, and shall discharge the assignee, subject to compliance with the order of the court, from all liability as assignee to any creditor of the insolvent.

This section is the same as 34 of the Act of 1880.

If the order of the insolvency court in sustaining an account of an assignee which omits the claim of a creditor and refuses him a *pro rata* share of the estate is erroneous; the remedy is by appeal and not by an action in equity to require the claim to be included in the account. *Julien v. Riley*, 61 Cal. 242.

## ARTICLE V.

### PARTNERSHIPS AND CORPORATIONS.

SECTION 39. Two or more persons who are partners in business, or the surviving partner of any firm, may be adjudged insolvent, either on the petition of such partners, or any one of them, or on the petition of five or more creditors of the partnership, qualified as provided for in section nine of this act, in which case an order shall be issued in the manner provided by this act, upon which all the joint stock and property of the partnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as may be exempt by law; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignee shall be chosen by the creditors of the copartnership, and shall also keep separate accounts of the joint stock or property of the copartnership, and the separate estate of each member thereof, and after deducting out of the whole amount received by such assignee the whole amount of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock after the payment of the joint debts, such balance shall be divided and appropriated to and among the separate estate of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any insolvency; and the sum so appropriated to the sep-

arate estate of each partner shall be applied to the payment of his separate debts, and the certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been by or against him alone under this act; and in all other respects the proceedings as to the partners shall be conducted in the like manner as if they had been commenced and prosecuted by or against one person alone. If such copartners reside in different counties, the court in which the petition is first filed shall retain exclusive jurisdiction over the case. If the petition be filed by less than all the partners of a copartnership, those partners who do not join in the petition shall be ordered to show cause why they, as individuals, and said copartnership, should not be adjudged to be insolvent, in the same manner as other debtors are required to show cause upon a creditors' petition, as in this act provided; and no order of adjudication shall be made in said proceedings until after the hearing of said order to show cause; *provided*, that in case of proceedings by or against surviving partners as such, only the partnership interests of deceased partners shall be subject to the control of the court in the insolvency proceedings; but the surviving partner, assignee, or creditors may pursue the property of the deceased partners in the court having jurisdiction thereof in probate proceedings.

The words "or the surviving partner of any firm," were not in the Act of 1880, section 35. The words "qualified as provided for in section nine of this Act," have also been added.

Also in the latter part of the section, in relation to a petition filed by less than all the partners, those who do not join in the petition shall be ordered to show cause, etc., the words "as individuals, and said a copartnership," are new as is the entire last clause beginning, "and no order of adjudication," etc.

#### *Partnerships.*

The cases of *Meyer v. Kohlman*, 8 Cal. 44; *California Furniture Co. v. Halsey*, 54 *id.* 315; *Glenn v. Arnold*, 56 *id.* 631; *Freeman v. Campbell*, *Id.* 639; and *in re Baker & Hamilton*, 55 *id.* 302, reviewed and *Held*, that none of those cases went further than to hold that by the Insolvent Act of 1852, and the act amendatory thereof, no provision was made for a discharge in insolvency of a partnership, nor the administration of partnership property. They do not hold that a member of a partnership cannot be discharged from his individual liability for firm debts, and *Held*, further, that a discharge of a person who is a member of a firm from all his debts, is a discharge from his liability for the firm debts. *Hawley v. Campbell*, 62 Cal. 442; *Id.* 443.

Under the Act of 1852, *Held*, the discharge of a member of a partnership from all his debts operated as a discharge of his liability for partnership debts. *Dresbach v. His Creditors*, 63 Cal. 187.

In proceedings instituted by a partnership, none of the part-

nership property can be set aside as exempt. Partnership property is not exempt, though it belongs to the class of property which would be exempt if owned by one person *Cowan v. Creditors*, 77 Cal. 403.

In an action by an assignee to recover property alleged to have been transferred by an insolvent to his partner within one month prior to involuntary proceedings, it is proper for the court to instruct the jury on the subject of partnership, and a judgment limiting the recovery by the assignee to the interest of the insolvent as such partner, will not be reversed on the ground that the instructions placed too prominently before the jury, the law applicable to partnership relations. *Murray v. White*, 82 Cal. 119.

Prior to the Act of 1880, it was held that where partners severally filed their petitions in insolvency, the court acquired no jurisdiction over the partnership property, and that a discharge of the individual members did not operate to discharge the partnership debts. *Glenn v. Arnold*, 56 Cal. 631; *Freeman v. Campbell*, *Id.* 639.

That neither the Act of 1852 nor the supplementary Act of 1876, provided for the discharge of a partnership; said acts did not apply to partnerships. *In re Baker & Hamilton*, 55 Cal. 302.

That the Act of 1852 did not provide for proceedings by a partnership, and that the assignee of an individual partner in insolvency succeeded only to what remained of the individual partner's share, after all partnership debts and claims of other partners were paid. See *California Furniture Co. v. Halsey*, 54 Cal. 315.

Where an insolvent debtor has, in contemplation of insolvency, transferred his right and interest in all or any of certain sheep, and there is evidence of a partnership between him and the person to whom he made the transfer, it is not ground for reversal that the court, in an action by the assignee to recover the property, instructed the jury on the law of partnership. *Murray v. White*, 82 Cal. 119.

Proceedings in insolvency by or against a partnership or firm, is properly for or against them individually as partners, and the separate estate of each passes to the assignee. An allegation in the petition that the defendants individually named and described as partners, doing business under a firm name, are indebted to your petitioners, etc., can only be understood as charging that the indebtedness arose in the copartnership business. *Wright v. Cohn*, 88 Cal. 328.

*Corporations.*

The appellate court having no jurisdiction will not consider the question whether a foreign corporation doing business in this state can be adjudged an insolvent debtor. *Matter of Castle Dome M. & S. Co.*, 79 Cal. 246.

Where a corporation recognizes and ratifies a note and mortgage executed by its president, such ratification is binding upon an assignee of the corporation subsequently appointed in insolvency proceedings. *Gribble v. Columbus Brewing Co.*, 100 Cal. 67.

The act is made applicable to corporations, and when such proceedings have been properly commenced, the court acquires jurisdiction over the officers and affairs of the corporation for the purpose of carrying out the provisions of the act. This applies as well to insurance corporations as to others, and the subsequent commencement of proceedings under section 601 Political Code, to dissolve and wind up the affairs of an insurance corporation does not divest the court's jurisdiction under the insolvency proceedings. The provisions of section 601 are intended merely to secure the dissolution of the corporation, and do not confer upon the court which decrees the dissolution, the power to distribute its effects. The insolvency proceedings cannot be enjoined under the latter proceeding. *State I. & I. Co. v. San Francisco*, 101 Cal. 135.

The principal place of business as stated in its articles is its residence; but as in the case of an individual, its actual place of business, its scene of operations, the place where it buys and sells, may be in an entirely different place. A petition in involuntary insolvency may be properly filed in the county where the actual business of an individual or of a corporation is carried on, although the residence may be in another county. And parol testimony is admissible to show in what county an insolvent corporation has its principal place of business. *Creditors v. Consumer's Lumber Co.*, 98 Cal. 318.

A court of equity will compel a subscriber to stock of a commercial corporation which has become insolvent, to pay in the amount of his unpaid subscription for the benefit of the creditors of the corporation. *Harmon v. Page*, 62 Cal. 448.

The act of the legislature commonly known as the Bank Commissioner's Act, (Stats. 1878, p. 740 and 1887, p. 90) supercedes the Insolvency Act of 1880, so far as banking corporations are concerned. The enforcement of the Insolvent Act would defeat the plain purposes of the Bank Commissioner's Act. The latter

repeals all acts inconsistent therewith, and prohibition will lie to restrain the Superior Court from proceeding under the Insolvent Act, at the instance of the attorney-general. *People v. Superior Court*, 100 Cal. 105.

The assignee of an insolvent corporation may maintain attachment proceedings against non-resident subscribers to stock for the whole amount subscribed and unpaid, when it appears that the whole amount would not be more than sufficient to meet the indebtedness of the corporation. *Kohler v. Agassiz*, 99 Cal. 9.

SECTION 40. The provisions of this act shall apply to corporations, and upon the petition of any officer of any corporation, duly authorized by the vote of the board of directors or trustees, at a meeting specially called for that purpose, or by the assent in writing of a majority of the directors or trustees, as the case may be, or upon a creditor's petition made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors. All the provisions of the act which apply to the debtor, or set forth his duties, examination, and liabilities, or prescribe penalties, or relate to fraudulent conveyances, payments and assignments, apply to each and every officer of any corporation in relation to the same matters concerning the corporation. Whenever any corporation is declared insolvent, all its property and assets shall be distributed to the creditors; but no discharge shall be granted to any corporation.

This section is the same as 36 of the Act of 1880.

The bankruptcy court may order the application of capital stock of a corporation, it being a fund set apart for the payment of debts; and a resolution or agreement that no call should be made is void. The assignee may file a bill in equity against all delinquent share holders, or proceed against them separately at law. An order of the court to the assignee to collect a demand is conclusive evidence of his right to sue. *Sanger v. Upton*, 91 United States 56; Law Ed. 23, 220; *Carver v. Upton*, *Id* 64; *Id*. 224.

For a case where it was held necessary to have an independent action to set aside the void agreement before suing the stockholders, see *Scovill v. Thayer*, 105 United States 143; Law Ed. 26, 968, and compare *Pullman v. Upton*, 96 United States 328; Law Ed. 24, 818.

See note "Corporations" under section 39 *ante*.

## ARTICLE VI.

## PROOF OF DEBTS.

SECTION 41. All debts due and payable from the debtor at the time of the adjudication of insolvency, and all debts then existing but not payable until a future time, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the debtor.

This section is the same as 37 of the Act of 1880.

The proceedings in bankruptcy from the filing of the petition until the final settlement, is but one suit, and the court being always open for the purposes of bankruptcy proceedings, its proceedings in any pending suit are always open for re-examination upon application in any appropriate form. *Sandusky v. First Nat. Bank*, 23 Wall. 289; Law Ed. 23, 155.

Proceedings to prove demands are part of the bankruptcy proceeding. *Wiswall v. Campbell*, 93 U. S. 347; Law Ed. 23, 923; *Leggett v. Allen*, 110 U. S. 471; Law Ed. 28, 312.

Accrued interest constitutes part of a debt provable against a bankrupt, and may be included in the amount necessary to sustain a creditor's petition in involuntary proceedings. *Sloan v. Lewis*, 22 Wall. 150, Law Ed. 22, 832.

SECTION 42. All demands against the debtor for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, may be proved and allowed as debts to the amount of the value of the property so withheld, from the time of the conversion; *provided, however*, that if the assignee, or any creditor whose claim has been proven against the estate, shall request it in writing, the court shall require the matter of such claim for damages to be tried as an ordinary action at law, to determine the liability of the debtor for such damages.

The "proviso" in this section for trial of claims for damages is new; otherwise the section is the same as 38 of the Act of 1880.

Where goods were fraudulently purchased by an insolvent, the vendor may attach before the expiration of the credit given, and other creditors, subsequently attaching, cannot complain that the suit was prematurely brought. The debt was equitably due. *Patrick v. Montader*, 13 Cal. 435.

SECTION 43. If the debtor shall be bound as indorser, surety, bail, or guarantor, upon any bill, bond, note, or other specialty or contract, or for any debt of any person, and his liability shall not have become absolute until the adjudication of insolvency, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared.

This section is the same as 39 of the Act of 1880.

The insolvency of the principal debtor is no defense to the surety, either at law or in equity. *Hardeman v. Harris*, 7 How. U. S. 726; Law Ed. 12, 889.

SECTION 44. In all cases of contingent debts, and contingent liabilities, contracted by the debtor, and not herein otherwise provided for, the creditor may make claim therefor and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order of the final dividend; or he may, at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall be done in such manner as the court shall order, and shall be allowed to prove for the amount so ascertained.

This section is the same as 40 of the Act of 1880, and the same as 5068 of Revised Statutes.

Where the insolvent debtor had given notes under a contract for the purchase of certain lands and goods, the claim for the full amount of the notes was properly refused by his assignee in insolvency, where the claim had not been credited with the value of the land and there was no offer to convey the land in pursuance of the contract. *In re Harvey*, 32 Pac. Rep. 567; Appeal of Chaplin, 32 Pac. Rep. 567.

A demand is held to be uncertain and contingent so long as it remains uncertain whether a contract involved would ever give rise to an actual duty or liability, and there is no means of removing the uncertainty by calculation. *Riggin v. Magwire*, 15 Wall. 549; Law Ed. 21, 232.

SECTION 45. Any person liable as bail, surety or guarantor, or otherwise, for the debtor, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor, if he shall have proved the same, although such payments shall have been made after the proceedings in insolvency were commenced; and any person so liable for the debtor, and who has not paid the whole of said debt, but is still liable for the same, or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same in the name of the creditor.

This section is the same as 41 of the Act of 1880, and the same in substance as section 5070, Revised Statutes.

A surety on the bankrupt's note may prove his claim before he has paid it. *Mace v. Wells*, 7 How. U. S. 572; Law Ed. 12, 698.

But it was held in *Hadden v. Chambers*, 2 Dall. 236; Law Ed. 1, 363, that a surety on a joint and several bond with the bankrupt for the benefit of the bankrupt, could maintain an action for money paid, etc., where he had been compelled to pay the same subsequent to the bankrupt's discharge, upon the ground that he



could not have filed any claim thereon against the bankrupt's estate in the bankruptcy proceedings.

SECTION 46. Where the debtor is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the insolvency, as if the same became due from day to day, and not at such fixed and stated periods.

This section is the same as 42 of the Act of 1880, and the same as section 5071 Revised Statutes.

Where a lessee has abandoned the leased premises and repudiated the contract of lease without lawful excuse, prior to an adjudication in insolvency of the lessee, a claim for damages by the landlord beyond the rent of the premises up to the time of the insolvency is not a debt provable against the estate. *Estate of Bell*, 85 Cal. 119.

SECTION 47. In all cases of mutual debts and mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed and paid. But no set-off or counter claim shall be allowed of a claim in its nature not provable against the estate; *provided*, that no set-off or counter-claim shall be allowed in favor of any debtor to the insolvent of a claim purchased by or transferred to him after the filing of the petition by or against him.

This section is the same as 43 of the Act of 1880, and substantially the same as 5073 of Revised Statutes, except that the words "for the purpose of making such set-off" have been omitted from the closing line.

Where a debtor sent money to his creditor with directions to apply it on a mortgage debt, the creditor cannot afterwards set up against the assignee an unsecured account against the bankrupt, in defense of his failure to apply the money as directed. The creditor did not become a creditor by receipt of the money, but a trustee, to apply the money as directed, and mutual debts and mutual credits referred to in the statute must be such as existed at the commencement of the bankruptcy proceedings. *Libby v. Hopkins*, 104 U. S. 303; *Law Ed.* 26, 769; *Boatman's Sav. Bank v. State Sav. Assn.*, 114 U. S. 265; *Law Ed.* 29, 174.

A mortgage of the homestead executed by husband and wife, may be foreclosed after the husband's insolvency, without presenting the claim to the assignee. *Montgomery v. Robinson*, 76 Cal. 229.

A discharge in insolvency does not prevent the foreclosure of a mortgage given prior to the commencement of insolvency proceedings to secure a note of the debtor, but the recovery in such

foreclosure will be limited to the mortgaged premises and its proceeds, and a judgment over for a deficiency is erroneous. *Lansing v. Brady*, 10 Cal. 266.

Where there are secured and unsecured claims against an insolvent, the secured creditors must first exhaust their securities, apply the proceeds to the diminution of their claims and then share *pro rata* with the unsecured claimants as to the balance of their demands. *In re Frasch*, 31 Pac. Rep. 755, (Wash.); *Dexter, Horton & Co., v. Schwabacher Bros. & Co., Id.*

SECTION 48. When a creditor has a mortgage, or pledge of real or personal property of the debtor, or a lien thereon, for securing the payment of a debt owing to him from the debtor, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the receiver, if any, and if no receiver, then upon such sum as the court, or a judge thereof, may decide to be fair and reasonable, before the election of an assignee, or by a sale thereof, to be made in such manner as the court, or judge thereof, shall direct; or the creditor may release or convey his claim to the receiver, if any, or if no receiver then to the sheriff, before the election of an assignee, or to the assignee if an assignee has been elected, upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the debtor's right of redemption thereon on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon, and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not sold or released, and delivered up, or its value fixed, the creditor shall not be allowed to prove any part of his debt.

This section corresponds to section 44 of the Act of 1880, and 5075 of Revised Statutes, but the words "receiver," "sheriff" and "judge thereof," and "may decide to be fair and reasonable before the election of an assignee," are new.

As to liens generally, against the property of the insolvent, see next section (49) and notes.

An adjudication of insolvency and order staying proceedings do not preclude a mortgagee from foreclosing his mortgage against the property of the insolvent, and procure order of sale thereof to satisfy the debt, but he cannot prove his debt nor any deficiency against the insolvent estate except as provided in section 44, Act of 1880. *Montgomery v. Merrill*, 62 Cal. 385.

The lien of mortgage on growing crop is not lost by the mortgagee permitting the mortgagor to store the crop as harvested, in a warehouse and the mortgagor may rightfully assign the warehouse receipt to the mortgagee even on the same day that he

files his petition in insolvency, and such transfer is valid as against the assignee in insolvency subsequently appointed. Under such circumstances the mortgagee may maintain conversion against the warehouseman for delivering the crops to a vendee of the assignee. *Campodonico v. O. I. Co.*, 87 Cal. 566.

Mortgages given by the insolvent were treated as conveyances, with reference to the time within which they were given and as to the intent to give a preference and as to the knowledge of the party to whom they were given. *Wager v. Hall*, 16 Wall 584; Law Ed. 21, 504. *Auffm'ordt v. Rasin*, 102 U. S. 620; Law Ed. 26, 262. *Blennehasset v. Sherman*, 105 U. S. 100; Law Ed. 26, 1080.

SECTION 49. No creditor proving his debt or claim, shall be allowed to maintain any suit at law or in equity therefor, against the debtor, but shall be deemed to have waived all right of action and suit against him,

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SECTION 49. No creditor, proving his debt or claim, shall be allowed to maintain any suit at law or in equity therefor, against the debtor, but shall be deemed to have waived all right of action and suit against him; and all proceedings already commenced, or unsatisfied judgment already obtained thereon, shall be deemed to be discharged and surrendered thereby; and after the debtor's discharge, upon proper application and proof to the court having jurisdiction, all such proceedings shall be dismissed, and such unsatisfied judgments satisfied of record; *provided*, that no valid lien existing in good faith thereunder shall be thereby affected; *and further provided*, that a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the debtor where a discharge has been refused or the proceedings have been determined without a discharge. And no creditor whose debt is provable under this act shall be allowed, after the commencement of proceedings in insolvency, to prosecute to final judgment any action therefor against the debtor until the question of the debtor's discharge shall have been determined, and any such suit or proceeding shall, upon the application of the debtor or of any creditor, or the assignee, be stayed to await the determination of the court in insolvency on the question of discharge; *provided*, that there be no unreasonable delay on the part of the debtor or the petitioning creditors, as the case may be, in prosecuting the case to its conclusion; *and provided also*, that if the amount due the creditor is in dispute, the suit, by leave of the court, in insolvency may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proven in insolvency, but execution shall be stayed as aforesaid; *provided further*, that where a valid lien or attachment has been acquired or secured in any such action, and an undertaking been offered and accepted in lieu of such lien or attachment, the case may be prosecuted to final judgment for the purpose of fixing the liability of the sureties upon such undertaking, but execution against the insolvent upon such judgment shall be stayed. [In effect 60 days from February 26, 1897.]

such judgment shall be stayed.

This section is the same as section 45 of the Act of 1880, and substantially the same as 5105-5106, Revised Statutes.

In the absence of any statute, an adjudication in insolvency does not affect any lien upon the property of the insolvent existing at the commencement of the insolvency proceedings. The Act of 1880, declaring that attachments shall be thereby dissolved, only excludes attachments from the general rule and all

other existing liens are left undisturbed, and the property will go into the hands of the assignee subject to all existing valid liens except attachments. The court has no authority to restrain the sale of property upon which execution was levied prior to the insolvency proceedings. *Vermont M. Co. v. Superior Court*, 99 Cal. 579. See *Crawford v. Maddux*, 100 Cal. 222.

In order to prevent seizure under an attachment issued from the District Court, the defendant gave an undertaking with two sureties, conditioned to pay any judgment recovered in the case. The defendant subsequently filed his petition in bankruptcy and was adjudged a bankrupt. He did not answer to the action in the state court nor set up the bankruptcy proceeding, and judgment was taken against him by default. On appeal from a judgment recovered on the bond, *Held*, the bond was not "a forthcoming bond," but was conditioned to pay any judgment, etc. It does not appear but that plaintiff obtained leave of the bankruptcy court to prosecute his suit to judgment, to the end that he might avail himself of his security. The proceedings in bankruptcy did not *ipso facto* affect the jurisdiction of the state court, therefore the judgment of the latter cannot be attacked collaterally. *Goodhue v. King*, 55 Cal. 377.

It may be suggested that although the state act provides for an order staying all proceedings, it would be well that the record in a case analogous to the above, should show that there was not an order permitting a prosecution of the case in order to render the security available, as such order might properly be made. For instance, it is held that an order of stay in insolvency proceedings, if properly made, can be enforced by the court making it; and a disregard of such order by any court might amount to an error for which its judgment would be reversed; but such an order does not deprive other courts of their ordinary jurisdiction within the meaning of section 1102 C. C. P., so as to authorize prohibition. *Bandy v. Ransome*, 54 Cal. 87. Hence it may be presumed that the error, unless appealed from, would generally not be subject to collateral attack. And it was held in *Goodhue v. Rice*, 53 Cal. 302, that an application for stay of proceedings because of the adjudication, is a motion, and the plea and evidence in support of it should be embodied in a bill of exceptions in order to present the issue and ruling thereon to the Supreme Court.

This subject may also be pursued with profit by referring to *Harding v. Minear*, 54 Cal. 502, where it was held that a supplemental answer would not be permitted which might deprive the

plaintiff of his benefit under a bond given to release from attachment, property of the debtor, who had subsequently filed his petition in bankruptcy. Nevertheless it is held that the order, under the Acts of 1880 and 1852, staying proceedings, operates *ipso facto* and without notice to a sheriff or to the court under whose process he is acting. *Cerf v. Oaks*, 59 Cal. 132. And the sheriff may be punished for contempt in not turning over attached property. *Von Roun v. Superior Court*, 58 Cal. 358; *Ex parte Desmond*, 59 *id.* 399.

A debt secured by a mechanic's lien is not provable under the Insolvent Act, and the time for commencing an action to foreclose such lien is not stayed or extended by that act. *Bradford, et al, v. Dorsey, et al*, 63 Cal. 122.

The lien acquired by the levy of execution prior to the filing of petition in insolvency is not divested by the insolvency proceeding. *Vermont M. Co. v. Superior Court*, 99 Cal. 581; *Howe v. Union Ins. Co.*, 42 *id.* 533.

The lien acquired by execution under a judgment by confession will not be set aside at the instance of the assignee in insolvency of the judgment debtor, if the judgment creditor did not know of the insolvency of the debtor and had no design to procure preference over other creditors. *Bernheim v. Christal*, 76 Cal. 567.

As to mortgage liens see section 48 and notes.

SECTION 50. Any person who shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given; nor shall he receive any dividend thereon until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference.

This section is the same as 46 of the Act of 1880, and is substantially the same as 5084 Revised Statutes.

Where a creditor who has received a preference contrary to the bankrupt act (Sec. 5084 Rev. Stats.) surrenders to the assignee the advantage of his preference, he may prove his claim and be entitled to dividends, although such surrender be made after litigating the matter with the assignee. *Streeter v. Nat. Bank*, 147 U. S. 37; Law Ed. 37, 68.

SECTION 51. The court may, upon the application of the assignee, or of any creditor of the debtor, or without any application before or after adjudication in insolvency, examine upon oath the debtor in relation to his property and his estate, and any person tendering or making proof of

claims, and may subpoena witnesses to give evidence relating to such matters. All examinations of witnesses shall be had and depositions shall be taken in accordance with and in the same manner as is provided by the Code of Civil Procedure.

This section is the same as 47 of the Act of 1880, and substantially as 5086, 5087 of Revised Statutes.

It is held that an insolvent debtor upon examination in the insolvency court, cannot be required to answer questions where he would subject himself to prosecution under section 154 of the Penal Code. *Ex parte Clarke*, 103 Cal. 352.

## ARTICLE VII.

### DISCHARGE.

SECTION 52. At any time after the expiration of three months from the adjudication of insolvency, but not later than one year from such adjudication, unless the property of the insolvent has not been converted into money, the debtor may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given to all creditors who have proved their debts, to appear, on a day appointed for that purpose, and show cause why a discharge should not be granted to the debtor; said notice shall be given by mail and by publication at least once a week, for four weeks, in a newspaper published in the county, or city and county, or, if there be none, in the newspaper published nearest such county, or city and county; *provided*, that if no debts have been proven, such notice shall not be required.

The words, "but not later than one year from such adjudication, unless the property of the insolvent has not been converted into money," were not in the prior Insolvent Acts of this state. (Sec. 48, Act 1880.)

There was no provision under the Act of 1852 for the discharge of a banker, in insolvency, nor for those who have been guilty of fraud, but the court takes jurisdiction of the proceedings where there is nothing on the face of the proceedings which would prevent such jurisdiction from attaching. *Cohen v. Barrett*, 5 Cal. 195.

The fact that the court was adjourned, though not for the term, at the time set for hearing objections of creditors, and that the hearing was had before the judge, is no objection to the regularity of the proceedings under the statute. *Clarke v. Ray*, 6 Cal. 600.

It was held that the discharge of an insolvent must be by a judgment of the court, and in the same county where the proceedings were instituted, consequently a discharge signed by the district judge in chambers, in the same district but in another county,

was no bar to an action by a creditor against the insolvent. *Turner v. McIlhane*, 6 Cal. 288.

A discharge in insolvency does not prevent the foreclosure of a mortgage given prior to the proceedings, to secure a note of the debtor, but the recovery in such foreclosure will be limited to the mortgaged premises and its proceeds, and a judgment over for a deficiency is erroneous. *Luning v. Brady*, 10 Cal. 266.

Section 473, C. C. P., has no application to an order granting the discharge of an assignee in insolvency, and where the assignee has discovered property belonging to the estate of the insolvent more than six months after such discharge, the court may set aside such order of discharge and permit the assignee to recover such property. *Reud v. Cooper*, 34 Pac. Rep. 98 (Cal. not in reports.)

Whether one claiming a discharge in insolvency has strictly complied with the provisions of the statute is a question of law for the court, and not one of fact for the jury. *Schloss v. His Creditors*, 31 Cal. 201.

A judgment rendered against an insolvent after his discharge, in an action which had been commenced prior to insolvency proceedings, and where the defendant did not interpose a plea of discharge in bar of the judgment, is not void. He had a right by supplemental answer to set up his discharge. The judgment if not appealed from is not void even though the discharge had been pleaded, but would be conclusive that plaintiff was entitled to judgment notwithstanding the discharge. He might have moved to vacate the judgment if taken against him by surprise, inadvertance, etc. Equity will not restrain execution of such judgment where there is a remedy at law. *Rahm v. Minix*, 40 Cal. 421.

The granting and refusing of motions to set aside a discharge in insolvency where the motion is based upon excusable neglect, surprise, etc., is largely in the discretion of the *nisi prius* court, and its rulings will not be disturbed unless abuse of discretion is shown. *Longnecker v. His Creditors*, 17 Pac. Rep. 220, (Cal. not in reports.)

A discharge in insolvency may be had, although the debtor had already made an assignment of all his property, under the Civil Code for the benefit of his creditors. *Dresbach v. His Creditors*, 63 Cal. 187.

A debt contracted prior to the Insolvent Act of 1880, may be discharged thereunder. *Pomeroy v. Gregory*, 66 Cal. 574.

In an action for conversion, where the property converted

never belonged to the insolvent's estate and could not have been distributed in the insolvency proceedings, evidence of a discharge in insolvency is inadmissible.

It is assumed that the insolvent court could not, as a matter of law, transfer the title of plaintiff's property nor prohibit plaintiff from maintaining an action to recover it. *Wood v. McDonald*, 66 Cal. 546.

A debt evidenced by a promissory note which does not state any place for payment, executed by a resident of this state to a resident of another state, and who continued such non-resident, is not barred by a discharge in insolvency of the maker in this state. *Rhodes v. Bordon*, 67 Cal. 7.

A debtor cannot be discharged under the State Insolvent Act after having been adjudged a bankrupt on his own petition in the United States District Court, and there refused a discharge from the same debts from which he seeks to be discharged in insolvency. In the Matter of Wm. F. Smith, 68 Cal. 203.

A certificate of discharge is *prima facie* valid as a discharge of all debts except as specified in the act. The burden is on a creditor claiming not to be bound by reason of his residence in another state. *Porter v. Imus*, 79 Cal. 183.

Under the Act of 1880, a debt contracted in 1878 can be discharged, and the act is not obnoxious as impairing the obligation of contracts. *Porter v. Imus*, 79 Cal. 183.

Under section 10, Art. I, U. S. Constitution, a state is prohibited from passing an Insolvent Act which would have the effect of discharging obligations arising under contracts made elsewhere, when the creditor in no wise participates in the insolvency proceedings. *Lowenberger v. Levine*, 93 Cal. 215.

An application to set aside a discharge because fraudulently procured need not be by motion in the insolvency proceedings.

It may be set aside by the court that granted it, in any suitable proceedings for that purpose. *Estudillo v. Meyerstein*, 72 Cal. 317.

An order of discharge may be vacated where pending a hearing on the motion for discharge, a stipulation was filed allowing the application to go off the calendar to be reinstated upon stipulation or motion, and the insolvent causes the matter to be called up and his discharge granted without any notice, and where there were objections to the discharge which would have been urged if notice had been given, and the objections will be heard, notwithstanding the time for objection would have been too late



except for the stipulation entered into. *Matter of Wolfe*, 81 Cal. 652.

A discharge granted in this state is no bar to an action in this state on a judgment rendered in another state in favor of a resident of that state and who was not a party to the insolvency proceedings. *Bean v. Loryea*, 81 Cal. 151.

The insolvent has nothing to do with the appointment of an assignee, and his discharge cannot be hindered by failure of the creditors to meet and appoint one. He is entitled to apply for his discharge any time after three months from the adjudication in insolvency. *Matter of Harris*, 81 Cal. 350.

The allegation of payments made by the insolvent in a petition in involuntary insolvency and not denied by him are no answer to the insolvent's oath taken on his application for discharge, especially where such allegations did not charge the payment to have been fraudulent or to prevent the money coming to the hands of the assignee or being distributed. *Id.*

The discharge of an insolvent does not affect the rights of a surety on a note which the latter subsequently contributes to pay, the payee of the note being absent from the state during the insolvency proceedings, and being in no way a party thereto. A surety afterwards paying such note is entitled to contribution from his co-sureties. *Stone v. Hammell*, 83 Cal. 547.

The discharge releases the debtor from the liability of a contract of hiring for five years, and the discharge is a bar to an action on the contract to recover money accruing thereunder subsequent to the discharge. *Sharpstein and Thornton, J. J. dissenting. Mooney v. Detrick*, 85 Cal. 549.

SECTION 53. No discharge shall be granted, or if granted, shall be valid, if the debtor shall have sworn falsely in his affidavit, annexed to his petition, schedule or inventory, or upon any examination in the course of the proceeding in insolvency, in relation to any material fact concerning his estate, or his debts, or to any other material fact; or if he has concealed any part of his estate or effects, or any books or writing relating thereto; or if he has been guilty of fraud or willful neglect in the care, custody or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this act, or if he has caused or permitted any loss or destruction thereof; or if within one month before the commencement of such proceedings, he has procured his lands, goods, moneys or chattels to be attached, or seized on execution, or if he has destroyed, mutilated, altered or falsified any of his books, documents, papers, writings, or securities, or has made, or been privy to the making of, any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; or if he has given any fraudulent pre-

ference, contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate; or if, having knowledge that any person has proven such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge; or if, being a merchant or tradesman, he has not, subsequently to the passage of this act, kept proper books of account; or if he, or any other person on his account, or in his behalf, has influenced the action of any creditor, at any stage of the proceedings, by any pecuniary consideration or obligation; or if he has in contemplation of becoming insolvent, made any pledge, payment, transfer, assignment or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is, or may be, under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts; or if he has been convicted of any misdemeanor under this act, or has been guilty of fraud contrary to the true intent of this act, or, in case of voluntary insolvency, has received the benefits of this or any other act of insolvency or bankruptcy within three years next preceding his application for discharge; or if insolvency proceedings in which he could have applied for a discharge are pending by or against him in the Superior Court of any other county or city or county in the state. And before any discharge is granted, the debtor shall take and subscribe an oath to the effect that he has not done, suffered or been privy to any act, matter, or thing specified in this act, as grounds for withholding such discharge or as invalidating such discharge, if granted.

The only difference between this section and 49 of the Act of 1880, occurs near the latter part of the section in the words, "or if insolvency proceedings in which he could have applied for a discharge are pending by or against him in the Superior Court of any other county in the state." It is also substantially the same as 5110, of the Revised Statutes. The latter specified *four* instead of *one* month as to the time within which the insolvent had procured his lands, etc., to be attached; and prevented or invalidated the discharge if the debtor had removed, or caused any part of his property to be removed from the district with intent to defraud his creditors.

Any law impairing the obligation of a contract is opposed to both federal and state constitutions. The decisions bearing upon this subject are diversified and almost innumerable, arising out of the questions: What is a contract? What is the obligation of a contract? and what does or does not impair the obligation? That an insolvency law which discharges the insolvent from debts contracted before the enactment of such law, impairs the obligation and is obnoxious to the constitutional provision, was held in the early cases of *Sturges v. Crowninshield*, 4 Wheat. 122; (*Law Ed.* 4,

529); *F. & M. Bank v. Smith*, 6 *id.* 131; (Law Ed. 5, 224); *Ogden v. Sanders*, 12 *id.* 606; (Law Ed. 6, 606); *Boyle v. Zacharie*, 6 Pet. 348; (Law Ed. 8, 423); and these have been commented on and affirmed in numerous cases subsequently.

By the obligation of a contract is meant the means which, at the time of its creation, the law affords for its enforcement. Justice Field, in *Louisiana v. St. Martin's Parish*, 111 U. S. 716; Law Ed 28, 574.

Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against impairment.

The obligation of a contract is the law which binds the parties to perform their agreement.

Any impairment of the obligation—the degree of impairment is immaterial—is within the prohibition of the constitution. The state may change the remedy, provided no substantial right secured by the contract is impaired. Justice Swayne, in *Walker v. Whitehead*, 16 Wall. 314. (Law Ed. 21, 357.)

Also, *State of Louisiana v. City of New Orleans*, 12 Otto 203; Law Ed. 26, 132, where the note refers to numerous later cases in connection with *Sturges v. Crowninshield*; and the same note referring to *Bronson v. Kinzie*, 42 U. S. (1 How.) 311, and many other cases in support of the statement that the obligation is impaired, where the remedy is abolished, or the legal obligation diminished, suspended or destroyed by relaxing or abolishing the legal remedy, or the proceedings for enforcement are burdened with new conditions or restrictions.

It is beyond the province of this work to analyze or even cite the numerous cases.

As to the validity of an insolvent law which would discharge antecedent debts, the question has been at least approached in four decisions of our own Supreme Court. *Hundley v. Chaney*, 65 Cal. 363; *Ohleyer v. Bance*, *Id.* 546; *Porter v. Imus*, 79 *id.* 183; and *Pomeroy v. Gregory*, 66 *id.* 574. The first cited case of *Hundley v. Chaney* is the supporter of the latter three, and is the only one necessary to consider. The court in that case seems to attach importance to the fact that the Act of 1880 contains restrictions or burdens greater and more onerous upon the debtor than were imposed by the former act, and that therefore the creditor should not be heard to complain upon the ground that the latter act impairs the obligation of the contract, but the decision is made to rest chiefly upon the fact that the Act of 1880 only repealed the

Act of 1852 and amendments, in so far as they were inconsistent therewith, and that as to the discharge of debts contracted prior to 1880, the former act was not repealed but was continued in force.

As to the first of these grounds, it may be properly said that both the Acts of 1880 and 1895 make very material digressions from its respective predecessor, and that the Act of 1895 in particular has changed the law radically as to the rights of creditors in involuntary proceedings, its general scope seemingly being to favor the unsecured creditor at the expense of the debtor and the secured creditors. And unlike the Act of 1880, it absolutely repeals the former law, instead of only repealing it in so far as inconsistent. The Act of 1880 becomes absolutely dead upon the taking effect of the new law. Proceedings commenced under the former may be continued under the latter, but the procedure must be conducted in accordance with the new law. *Strueven v. His Creditors*, 62 Cal. 45, 48.

The point made in *Hundley v. Chaney* that the new law is more burdensome to the debtor than the former, does not seem well taken.

As was said in *Sanborn v. His Creditors*, 37 Cal. 609, the "relief" and "protection" provided for by the insolvent law proceed *pari passu*. So with reference to the impairment of the obligation of contracts, it cannot be held that the law is valid, because it benefits the creditor at the expense of the debtor, and that the debtor may not be heard to object to involuntary proceedings under a new law which compels him to submit to conditions and burdens which did not exist when the contract was made. It is submitted that the only theory upon which debts contracted prior to 1895 can be discharged under the new act, is that a law providing for discharge in insolvency existed at the time of incurring the debt, and therefore a discharge in insolvency was a condition in contemplation of the parties at the time of contracting, and such condition having formed a part of the contract, the "obligation" is not impaired by a subsequent law also providing for a discharge; and the only objection to this theory is the very state of facts alluded to in *Hundley v. Chaney*, where the changes in the law create material alterations affecting the procedure and imposing materially different burdens upon either of the parties. If the repealing clause of the Act of 1895 had been the same as that of 1880, *Hundley v. Chaney*, and the subsequent cases cited would have settled this question in this state, but the law of 1880 is absolutely repealed

and the procedure as well as the results of the new law are substituted.

As already suggested, the question here raised is not answered by the fact that an insolvency law which provided for a discharge existed when the contract was made, and that the new law imposes new burdens only upon the debtor; for a law would be unconstitutional which compelled a debtor to pay gold when he had contracted to pay in wood or silver, or compelled him to pay at an earlier date than he had contracted to pay. The obligation to pay and the right to demand go hand-in-hand, and the law that impairs one, must equally impair the other. It may be said that the vice of the law is in the fact that it is more favorable to one than the other, and it is immaterial as to which one the favor is extended. In other words the legislature cannot make a new contract for the parties containing terms or conditions which they did not have in contemplation at the time of contracting for themselves, and it is not necessary that this rule be considered in connection with the constitutional inhibition against impairing the obligation of contracts. Hence, if we contend that the new act does not violate the obligation of the former contract, because there was an insolvency act existing when the contract was entered into, we still have to meet the question whether the new law imposes conditions upon either of the parties materially changing their rights and conditions as considered by them at the time of contracting.

It is not believed that the changes in the law are of the character which would defeat the discharge of debts contracted prior thereto. The sections relating to discharge and objections are almost identical with the old law; the class of debts to be discharged and the acts declared to constitute insolvency are not materially different, and the important differences seem to relate to "procedure." Of course a debtor's objections could only be made in involuntary proceedings, while only non-participating creditors could object in either class of proceedings. It must be confessed, however, that a review of the authorities supplies argument of no mean force against the discharge, and caused a suggestion of this question under section 3 *ante*.

It is no objection to a discharge that the oath of the insolvent for his discharge was taken eleven months prior to the order of discharge, if when the oath was offered in evidence no objection was made to it. *Matter of McEachran*, 82 Cal. 219.

The affidavit required by the insolvent as a condition to his discharge is admissible in evidence in support of the matters it

is intended to show on trial of opposition by creditors to his discharge. The burden is on the creditors opposing the discharge when the affidavit of the insolvent has been filed. *Matter of Harris*, 81 Cal. 350.

The words "sworn falsely" necessarily import a wilful act done with fraudulent intent, and do not apply to an unintentional and innocent mistake in the affidavit. *Demartin v. Demartin*, 85 Cal. 76.

Where a judgment is obtained against one who afterwards procures a discharge in insolvency, and after this discharge and execution is issued on the judgment, and the sheriff, by virtue of the same, makes a levy on personal property in the hands of a third person, as the property of the defendant in the execution, and such third person sues the sheriff to recover damages, it is error in the court to refuse to the sheriff to show in his defense that the property really belonged to the insolvent, who had placed the same in the plaintiff's hands during the insolvency proceedings to defraud his creditors. *Ellassar v. Hunter*, 26 Cal. 279.

Under section 48 of the Act of 1880, permitting the application for the discharge to be made after three months, such discharge will not be delayed by the failure of the assignee to qualify, where the creditors failed to appear at the time appointed by the court to select one. *In re Harris*, 81 Cal. 350.

Section 49 of the Act of 1880, which provides that no discharge shall be granted, etc., if the debtor or any person on his behalf shall have influenced the action of any creditor, by any pecuniary consideration "or obligation," does not require that the obligation should be in writing, or one that could be enforced in the courts. A mere verbal promise is sufficient. *Estudillo v. Meyerstein*, 72 Cal. 317.

The Insolvent Act of 1880, sections 49, 55, declare void "fraudulent preferences contrary to the provision of this act," preferences "made in contemplation of becoming insolvent" and preferences "made within one month before filing a petition in insolvency." Allegations by a creditor that the insolvent made certain preferences more than a year before filing his petition, knowing himself to be insolvent, do not show valid grounds for withholding a discharge. *Dyer v. Bradley*, 88 Cal. 590; *Same v. Martin*, 88 Cal. 590.

A claim against the bankrupt for fraud or deceit practiced by him is not discharged in bankruptcy, even where the demand was proven against his estate and a dividend accepted on account.

Strang v. Bradner, 114 U. S. 555; Law Ed. 29, 248, and the "fraud" mentioned in section 33 of the Act (Rev. Stats, 5110) of 1867, means positive fraud, involving moral turpitude. *Id.*

Upon the issue of fraud, in an application of an insolvent to be discharged from his debts, where it was alleged that the applicant had made and recorded a sham deed of his property shortly before his application, which property was not included in his schedule, *Held*, that it was error for the court to instruct the jury "that to find the charge of fraud sustained, they must believe the deed made with the intent to defeat, hinder, or delay creditors, and to have been actually delivered to the grantees; that proof of record was no proof of delivery," etc. The fraud is as complete without delivery as with it. *Fisk v. His Creditors*, 12 Cal. 281. See notes under section 59 *infra*.

#### *Proper Books.*

That the failure to make proper entries in the books of the insolvent of certain small sums of borrowed money, proper books of account being otherwise kept, is not sufficient ground for denying discharge. *Siegel v. His Creditors*, 95 Cal. 409.

Where a loan of money is made to a firm, the item should appear on the firm's books, and where an entry of such indebtedness would have caused the books to show the firm insolvent, and without it the books would show the firm to be prosperous—the failure to make such entry is a failure to keep proper books. *Matter of Good*, 78 Cal. 399.

The failure of a merchant or tradesman to keep proper books of account will prevent him from obtaining a discharge, and his good faith in the matter is immaterial. *Id.*

The act did not prevent the discharge of an insolvent merchant or trader who did not keep proper books of account prior to the passage of the act. *Matter of Lukes*, 71 Cal. 113.

In *Moore v. His creditors*, 19 Cal. 691, the deposit of books, vouchers, etc., as required by section 6, was referred to as a matter of the highest importance, and that it should be strictly complied with. And where the debtor attempted to excuse his failure to make the deposit, by proof that some weeks prior to filing his petition he had sold his books and that they were no longer under his control, the excuse was held insufficient. It was held in the same case that a dismissal of the application for discharge without any specification in the opposition of this ground, or without an order requiring the debtor within a given time to produce and surrender his books, was erroneous.

The unexplained omission to deposit his books is set down as

a concealment for the advantage of petitioner, and therefore a fraud upon creditors. *Schloss v. Creditors*, 31 Cal. 205.

See notes under section 54 *infra* and section 6 *ante*.

SECTION 54. Any creditor opposing the discharge of a debtor shall file specifications in writing, of the grounds of his opposition, and after the debtor has filed and served his answer thereto, which pleadings shall be verified, the court shall try the issue or issues raised, with or without a jury, according to the practice provided by law in civil actions.

This section is the same as 50 of the Act of 1880. Revised Statutes 5111. "Any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may, in its discretion, order any question of fact so presented to be tried at a stated session of the District Court."

It is no objection to a discharge that the oath of the insolvent for his discharge was taken eleven months prior to the order of discharge, if, when the oath was offered in evidence, no objection was made to it. *Matter of McEachran*, 82 Cal. 219.

The affidavit required of the insolvent as a condition to his discharge is admissible in evidence in support of the matters it is intended to show, on trial of opposition by creditors to his discharge.

The burden is on the creditors opposing the discharge when the affidavit of the insolvent has been filed. *Matter of Harris*, 81 Cal. 350.

The assignee in insolvency under the Act of 1852, being a schedule creditor, might properly file objections to the discharge of the insolvent upon the ground of fraud in willfully and knowingly omitting property from his schedule, and executing a sham deed to defraud creditors, and it was error to strike out such opposition. *Hinkel v. His Creditors*, 63 Cal. 328.

It has been generally held that specifications of acts in an opposition to a discharge should be as specific as in an indictment. "The mere allegation that the bankrupt has given a fraudulent preference, contrary to the provisions of the act," is insufficient. *In re Butterfield*, 14 B. R. 147.

The right of a creditor to have a discharge set aside for the fraud of the insolvent in procuring the same, is not assignable, and the subsequent purchaser of the claim of the creditor has no right to contest the validity of the discharge. *Sanborn v. Doe*, 92 Cal. 152.

A creditor opposing a discharge of the insolvent must state facts which if denied will raise material issues under the provisions of



section fifty of the act. The same rule should apply as to direct allegations of facts as prevails in other civil actions. *Dyer v. Bradley*, 89 Cal. 557.

Specification of facts. *Moore v. Creditors*, 19 *id.* 691; *Schloss v. Creditors*, 31 *id.* 205.

Allegations of fraud, unless accompanied by particulars showing what the fraud was and how it was perpetrated, will be disregarded. *Green v. Hayes*, 70 *id.* 276; *Cosgrove v. Fisk*, 90 *id.* 75; *Estep v. Armstrong*, 91 *id.* 659; *Applegarth v. McQuiddy*, 77 *id.* 408.

Sections 49 and 55 of the Act of 1880 must be read and construed together, and the time there named within which transfers for the purpose of giving preference are prohibited must control. That a debtor made such transfer a year and more prior to filing a petition is no ground for opposing his discharge. *Id.*

At hearing of application for discharge, it appeared that the insolvent's partner in farming operations had, without his knowledge or consent, mortgaged a partnership crop to secure a firm debt for supplies and one of the petitioner's individual debts; that petitioner had unsuccessfully resisted his partner's delivery of the crop after it was harvested, in payment of said debts, and in his schedule he set forth those debts among his liabilities, and his interest in the crop among his assets. *Held*, these facts did not bring him within the provision of section 49 of the Act of 1880, prohibiting a discharge where the debtor has sworn falsely in his schedule, etc." *In re Bregard*, 84 Cal. 322.

Where the insolvent sold certain posts which he claimed to have reserved as firewood and therefore exempt, the value being small and he having acted in good faith without concealment, an order discharging him will not be reversed. *In re Bowman*, 83 Cal. 153.

It is not a valid ground of objection that the debt was contracted in fraud and while acting in a fiduciary capacity, since under section 52 such debts are not discharged. *Dyer v. Bradley*, 88 Cal. 590; *Same v. Martin*, *Id.*; *In re McEachran*, 82 Cal. 219.

The provision relates to fraud which affects the mass of creditors and not to those of individual creditors. *Siegel v. His Creditors*, 95 Cal. 409.

The fact that a creditor did not receive notice of the proceedings is no objection to a discharge, where the creditor has appeared in the proceedings. *Pomeroy v. Gregory*, 66 Cal. 572-574.

Where the answer denied all the allegations of fraud, it was

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proper to refuse to instruct the jury that under the pleadings the insolvent had admitted that he had made a payment of five hundred dollars while he was insolvent, and that if he had made such payment to prevent the money from coming to his assignee or from being distributed under the insolvent act, he is not entitled to a discharge. *In re Harris*, 81 Cal. 350.

And where accounts transferred by the insolvent to his attorney for the purpose of paying the expenses of insolvency proceedings are not unreasonably large, the creditors have no cause of complaint on account of the transfer. *Id.*

One creditor may file his objections to a discharge of the insolvent and withdraw the same without consent of other creditors. (Ross, J., dissenting.) *Brangon v. His Creditors*, 64 Cal. 394.

Where proceedings in insolvency were commenced under the Act of 1852, which did not require an answer to the opposition of a creditor to be verified, but the Act of 1880, was passed before the filing of the answer, *Held*, the answer should be verified. Section 68 of the Act of 1880, is not intended to continue the former mode of procedure in conflict with the latter act. *Strueven v. His Creditors*, 62 Cal. 45.

The Insolvent Act of 1852, did not require a creditor to be a judgment creditor in order to file opposition to discharge of insolvent debtor. Though a judgment obtained by the creditor be set aside, the record in insolvency showing him to be a creditor, he is entitled to file such opposition. *Davenport v. His Creditors*, 62 Cal. 29.

The verdict of a jury in favor of the insolvent upon an application for discharge will not be disturbed, where the evidence showed that he had collected a debt of twelve dollars after filing his petition and had not paid it to the assignee, but he testified that there was no fraudulent intent or attempt at concealment. *Smith v. His Creditors*, 59 Cal. 267.

The manner of opposing a discharge of the insolvent is pointed out by the statute. A demurrer and motion to make more definite are not proper. If the schedules or inventory are not sufficiently full or explicit, the insolvent and other persons may be examined under oath concerning all his affairs. *Wilson v. His Creditors*, 32 Cal. 406; *Hinkel v. His Creditors*, 63 Cal. 328.

The suggestion in *Grow v. His Creditors*, 31 Cal. 328, and *Bennett v. His Creditors*, 22 Cal. 38, that when the debtor's schedule is vague and indefinite, the proper course would be to move for a rule upon him to amend it, is disapproved in *Wilson v. His Creditors*, 32 Cal. 406.

Creditors may oppose a discharge of the insolvent either upon any supposed illegality of the proceedings resulting in the election of an assignee, which raises an issue of law, or upon any fraud in violation of the statute, in which latter event the issue will be one of fact. *Wilson v. His Creditors*, 32 Cal. 406.

An allegation in opposition to a discharge, that the insolvent had collected debts since filing his petition and had not paid over the money nor accounted to the assignee, constitutes a charge of fraud, and should state from whom the debts were collected, but as the issue was tried without such allegation, the objection is waived. *Grow v. His Creditors*, 31 Cal. 328.

An objection that the matters set up in an opposition to the debtor's discharge do not amount to fraud is equivalent to a general demurrer to the opposition. *Id.*

An attorney is not guilty of libel in filing an opposition to the insolvent's discharge, alleging on information derived from his client that the insolvent had been guilty of making fraudulent entries in his books, and had converted property to his own use while acting in a fiduciary capacity, had sworn falsely in relation to his estate, etc. Such publication is absolutely privileged. *Hollis v. Meux*, 69 Cal. 625.

The proceedings under the statute are not intended to be summary or hurried, but are, at least so far as the trial of opposition is concerned, to be conducted according to the course of the common law. Instead of its being necessary in the nature of the contest that judgment should be reached within a given interval, it is obvious that there is nothing to distinguish the controversy from litigation concerning property, or other personal interests at large. *People v. Roseborough*, 29 Cal. 417.

Where the insolvent does not answer charges of fraud preferred in opposition to his discharge (in voluntary insolvency) there is a failure on his part to prosecute his proceeding, for which, as in all other cases, the court may enter a dismissal. The act (1852) does not give the court power to adjudge him guilty of fraud as upon default, for failure to answer the charge, nor can the court compel him to answer nor answer for him. A judgment of fraud could only be entered upon verdict of a jury upon an answer or plea of not guilty. *Sanborn v. His Creditors*, 37 Cal. 609.

A verdict or finding that the insolvent did not include all his property in his schedule nor surrender all to his assignee is not sufficient to set aside a discharge of the insolvent without finding that such omission was fraudulent. *Tevis v. Hicks*, 41 Cal. 123.

The objection that the petitioner had been addicted to gambling and that his inability to pay his debts was, in great measure occasioned by losses in that way, was held not a valid objection as fraud upon creditors. The court saying that men gambled to win and not to lose and that the act did not deny a discharge to gamblers. Act of 1852. *Grow v. His creditors*, 31 Cal. 328.

On the trial of objections to the discharge of an insolvent on the ground of fraud in transferring his property, the person to whom the transfer is alleged to have been made is a competent witness, against the objection of interest. The record of the trial of such objections would not be legal evidence in behalf of the transferee in an action by the assignee in insolvency to recover the property from him. [The competency of the witness is now settled by sections 1879, 1880, 1881, C. C. P.] *Shawl v. His Creditors*, 19 Cal. 598.

It was held that in an action for goods sold, the defendant having plead a discharge in insolvency, he might offer in support of his plea, certified copies of the decree and of each of the papers composing the record in the insolvency proceedings, and that they need not all be attached together and certified to as one record. *Goldstone v. Davidson*, 18 Cal. 41.

A creditor is entitled to be heard in opposition to a discharge of the insolvent whether he has been named in the insolvent's schedule or not. *Lambert v. Slade*, 4 Cal. 337.

Where the name of the insolvent appears correctly twice in the published order of adjudication, a clerical error therein by which the name is once incorrectly given, will not invalidate the publication. And when the name of the insolvent is written at the head of the affidavit of deposit in the post-office as "H. K. being duly sworn, says:" but the affidavit is actually sworn to by another person, the affidavit is not vitiated, nor will a mistake in designating the address of the creditors in the affidavit by reference to the schedule which shows only their place of residence vitiate the discharge if the affidavit shows that the notice was addressed to the creditors at their place of business, nor a slight error in spelling the name of a creditor. *Pope v. Kirchner*, 77 Cal. 152.

The insolvent's right to a discharge accrues at the expiration of three months, and the discharge does not interrupt the rights of creditors in the distribution of whatever may be found to belong to the estate. If an excessive homestead has been set aside, an appeal from the order may cause the excess to be distributed

among the creditors notwithstanding a discharge granted pending the appeal. *Demartin v. Demartin*, 85 Cal. 76.

The Superior Court has power to set aside the order discharging the assignee and to proceed further in settling the insolvent estate. It may also upon petition require the insolvent, after discharge, to appear and show cause why the discharge should not be set aside for fraud of the insolvent, and may require the attendance and examination of other persons at said proceedings as witnesses. Dissenting opinion of Beatty, C. J., in *Wagner v. Superior Court*, 100 Cal. 359; *Rued v. Cooper*, 34 Pac. Rep. 98.

Where the effect of a discharge in insolvency is usually to discharge the person of the debtor it will not have that effect where the debtor is held under a *ca. sa.* issued out of the U. S. Circuit Court. *Duncan v. Darst*, 1 How. U. S. 301; Law Ed. 11, 139.

Where creditors oppose a discharge on the ground that the insolvent had executed a conveyance of property a few days before filing his petition, it is competent to show that in an action by the assignee to recover said property and set aside the deed of conveyance, the deed had been adjudged valid and not fraudulent. *In re Baird*, 84 Cal. 95.

Where a creditor had not received notice of the application for discharge he was permitted to enter his appearance after the return day. *In re Lewis Levin*, 14 B. R. 385. And where the original objector declined to prosecute his objections other creditors have been permitted to enter their appearance after the return day for the purpose of prosecuting. *In re S. S. Houghton*, 10 B. R. 337.

See notes under "Fraudulent Preferences," section 59 *infra*.

SECTION 55. If it shall appear to the court that the debtor has in all things conformed to his duty under this act, and that he is entitled under the provisions thereof to receive a discharge, the court shall grant him a discharge from all his debts, except as hereinafter provided, and shall give him a certificate thereof, under the seal of the court, in substance as follows: In the Superior Court of the county of —, State of California. Whereas, — has been duly adjudged an insolvent under the insolvent laws of this state, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said — be forever discharged from all debts and claims, which by said insolvent laws are made provable against his estate, and which existed on the — day of —, on which the petition of adjudication was filed by (or against) him, excepting such debts, if any, as are by said insolvent laws excepted from the operation of a discharge in insolvency. Given under my hand, and the seal of the Court, this — day of —, A. D. —. Attest: —, Clerk. (Seal) —, Judge.

This section is the same as 51 of the Act of 1880.

**SECTION 56.** No debt created by fraud or embezzlement of the debtor, or his defalcation as a public officer, or while acting in a fiduciary character, shall be discharged under this act, but the debt may be proved, and the dividend thereon shall be a payment on account of said debt; and no discharge granted under this act shall release, discharge or affect any person liable for the same debt, for or with the debtor, either as partner, joint contractor, indorser, surety, or otherwise.

This section is the same as 52 of the Act of 1880.

A judgment is but the original debt in a new form, and where it appears only by reference to the answer of defendant (the complaint being lost) that a judgment was obtained upon a debt contracted in fraud, a subsequent discharge in insolvency will not bar execution proceedings on such judgment. *Carit v. Williams*, 74 Cal. 183.

A discharge in insolvency is a bar to an action on a note given in this state to a citizen of this state, but indorsed and transferred to a citizen of another state subsequent to the discharge. *Thomas v. Crow*, 65 Cal. 470.

In an action on a promissory note the defendant pleaded a discharge in insolvency. *Held*, plaintiff might show the fraud of the defendant in intentionally omitting property owned by him from his schedule in insolvency. *Dean v. Baker*, 64 Cal. 232.

It is provided by section 32 of the Insolvent Act of 1852, that an insolvent could not avail himself of his discharge if it appears that he concealed any part of his property, gave a false schedule thereof, or committed any fraud under the act. And it is held competent for plaintiff in an action against the insolvent on a note in answer to defendant's plea of discharge, to prove that defendant had willfully and intentionally omitted from his schedules certain real property. *Id.*

The United States Bankrupt Act like the Act of 1880, precluded a discharge from a debt contracted while acting in a fiduciary capacity, and it was held that a person to whom goods are consigned to be sold for a stated sum which is to be sent to the consignor, and any surplus realized above that sum to be retained by the consignee, as commissions, acts in a fiduciary capacity. *Treadwell v. Holloway*, 46 Cal. 548.

Where it is apparent on the face of the record that the county court had no jurisdiction of the insolvency proceedings its judgment of discharge is void, and a creditor is entitled to pursue the ordinary remedies for enforcing his demand. *Sturgis v. Shepard*, 28 Cal. 115.

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A discharge in bankruptcy does not release from covenants of

warranty; the covenantor is still estopped by the covenant from setting up an after acquired title. *Bush v. Person*, 18 How. U. S. 82; Law Ed. 15, 273.

A bankrupt's discharge relates back to the deed of assignment. *Riley v. Lanear*, 2 Cranch. 344; Law Ed. 2, 300.

A discharge in bankruptcy does not release a co-obligor of the bankrupt, whether partner, joint contractor or otherwise. *Abendroth v. VanDolsen*, 131 U. S. 66; Law Ed. 33, 57.

A discharge releases the bankrupt from his liability to his surety on a note although it is then unpaid. *Mace v. Wells*, 7 How. U. S. 272; Law Ed. 12, 698.

A fine imposed for violating an injunction is not a "debt" within the meaning of the bankrupt law, and is not discharged, and a discharge will not prevent imprisonment of the bankrupt for default in payment of the fine. *Chapman v. Forsyth*, 2 How. U. S. 202; Law Ed. 11, 236.

*Henry Clews & Co.*, of New York, received certain bonds as collateral to secure them in the event of loss, if any, occasioned by credit advanced by them. Without authority they used the bonds as collateral for their own obligations and while so appropriated *Henry Clews & Co.*, failed and went into bankruptcy. No loss ever occurred by reason of their dealings with the depositor of the bonds. In an action to recover the bonds they set up the proceedings in bankruptcy and their discharge. *Held*, the discharge was a bar, that the liability for the bonds was not created while acting in a "fiduciary capacity." [The meaning of the term "fiduciary capacity" is fully discussed and numerous authorities cited in the opinion.] *Hennequin v. Clews*, 111 U. S. 676; Law Ed. 28, 565. See also *Upshur v. Briscoe*, 138 U. S. 365; Law Ed. 35, 931.

A debt is barred by the discharge although omitted from the insolvent's schedule, if the omission is not fraudulent, although the creditor residing within the jurisdiction, had no notice of the pendency of the proceedings. *Lamb v. Brown*, 12 B. R. 522; *Platt v. Parker* 13 *id.* 14. And even if fraudulently omitted. *Thurmond v. Andrews* *Id.* 157. Or no notice of the application for discharge. *Lamb v. Brown*, *supra*; *Williams v. Butcher*, 12 *id.* 143; *Pattison v. Wilbur*, *Id.* 193.

If the omission is fraudulent the remedy is to have the discharge set aside. *Thurmond v. Andrews* and *Lamb v. Brown*, *supra*; *Humble v. Carson*, 6 B. R. 84. Neither can a counterclaim by the insolvent be passed upon in such case because the

right thereto passed out of his hands upon his assignment in bankruptcy. *Id.*

Where the holder of a note consents to the discharge of the maker in bankruptcy without the consent of the endorser, he thereby releases the endorser, although the claim against the endorser has gone to judgment. *In re McDermott*, 14 B. R. 477.

There is no ground for setting aside or impeaching the discharge after two years, though the fraud invalidating it was not discovered until after that time. *Pickett v. McGavitt*, 14 B. R. 236. And to set aside a discharge the creditor cannot rely on evidence known to him at the time the discharge was granted. *In re Marionneaux*, 13 B. R. 222.

A discharge by an Insolvency Court of Oregon, is no bar to an action brought by a citizen of another state, when such creditor was not a party to the insolvency proceedings. *Main v. Messner*, 17 Ore. 78; 20 Pac. Rep. 255.

Where defendant in an action to recover money sets up his discharge in insolvency it is insufficient answer thereto by plaintiff that the discharge was obtained fraudulently, without alleging that he had no notice of the same at the time of the adjudication. *Rosenthal v. Schnieder*, 2 Wash. T. 144; 3 Pac. Rep. 837.

The granting a discharge in insolvency by a court in Wisconsin, of a citizen of that state, does not prevent a citizen of another state who was not a party to the insolvency proceedings, from bringing an action in Washington on a Wisconsin judgment obtained prior to the insolvency proceedings. *Weber v. Yancy*, 7 Wash. 84; 34 Pac. Rep. 473.

SECTION 57. A discharge, duly granted under this act, shall, with the exceptions aforesaid, release the debtor from all claims, debts, liabilities and demands, set forth in this schedule, or which were or might have been proved against his estate in insolvency, and may be pleaded by a simple averment that on the day of its date such discharge was granted to him, setting forth the same in full, and the same shall be a complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be *prima facie* evidence in favor of such fact, and of the regularity of such discharge; *provided, however*, that any creditor of said debtor, whose debt was proved or provable against the estate in insolvency, who shall see fit to contest the validity of such discharge on the ground that it was fraudulently obtained, and who has discovered the facts constituting the fraud subsequent to the discharge, may, at any time within two years after the date thereof, apply to the court which granted it to set it aside and annul the same, or if the same shall have been pleaded, the effect thereof may be avoided collaterally upon any such grounds.

This section is the same as 53 of the Act of 1880.



After the final discharge of the petitioner, the court is without power to examine the insolvent or others as witnesses for the purpose of ascertaining whether or not all the property of the insolvent estate had come into the hands of the assignee, but it seems that the discharge could be set aside, on petition, for fraud in procuring the discharge, as provided in section 53 of the Act of 1880. *Wagner v. Superior Court*, 100 Cal. 359. But see dissenting opinion of Beatty, C. J., p. 362.

If the insolvent neglects to set up his discharge in an action brought against him upon a debt existing at the time of the discharge, he will be bound by the judgment rendered against him. *Anderson v. Goff*, 72 Cal. 65.

The discharge can only affect the debts existing at the time of filing the petition in insolvency. The claim arising from the breach of a covenant made subsequently is not affected by the discharge. *Waggle v. Worthy*, 74 Cal. 266.

Where a discharge in insolvency is offered as a defense in an action against the insolvent on a promissory note, the question whether the petition and schedules in the insolvency were sufficient or insufficient to give the county court jurisdiction, is one of law, to be decided by the court and not by a jury. As to whether the insolvent had been guilty of fraud in making transfers or concealing property, is a question of fact for the jury. *Dean v. Grimes*, 72 Cal. 442.

Where notes are executed in this state to a resident of the state, but were held, without endorsement, by a non-resident, the discharge in insolvency of the maker is a good defense to an action on the notes by the holder. Not being endorsed, they remained the property of the payee. *Thomas v. Crow*, 65 Cal. 470.

A discharge under the Insolvent Act of 1880 is a good defense to a judgment rendered against the insolvent in 1876. *Hundley v. Chaney*, 65 Cal. 363.

In an action by a creditor against an insolvent who pleads his discharge, the mere fact that the insolvent did not surrender all his property is not sufficient to avoid the discharge. *Tevis v. Hicks*, 41 Cal. 123.

The remedy against an execution issued on a judgment which is claimed to have been discharged in insolvency is by motion in the case, and not by bill in equity for injunction. *Green v. Thomas*, 17 Cal. 86.

In pleading a discharge in insolvency as a defense it is sufficient to allege that the judgment was duly given or made. *Hanscom v. Tower*, 17 Cal. 518; see Sec. 456, C. C. P.

A discharge in insolvency of a debt, is equally a discharge of a judgment on that debt and the costs, rendered between the filing of the petition and the final discharge.

Relief against such judgment may be had by motion and even though fraud may be charged in opposition to such motion, an independent action is not necessary. The court can form issues and have the issue of fraud tried under the motion. Relief may be a perpetual stay of execution, or by order setting it aside. The remedy at law being sufficient, equity will not interfere. *Inlay v. Carpentier*, 14 Cal. 173.

The insolvent is not required to file a verified inventory or schedule in involuntary proceedings, and his discharge cannot be successfully resisted because the inventory and schedule filed by him in obedience to the order of the court is not verified. [The Act of 1880 did not, but the present act does require the verification, the same as in voluntary proceedings; see Sec. 13.] *Matter of Green*, 96 Cal. 162.

Upon a collateral attack upon a discharge in insolvency, a creditor cannot raise objections to the mere vagueness of the petition, or objections which amount to a special demurrer, there not being a total absence of essential averments. *Pope v. Kirchner*, 77 Cal. 152.

It will not be presumed that debts were not created after the passage of the Act of 1880, in order to defeat the insolvency proceedings in a collateral attack. *Ohleyer v. Bunce*, 65 Cal. 544.

#### *U. S. and Miscellaneous Decisions.*

Decrees of the United States District Courts in bankruptcy are as conclusive against collateral attack as the decrees of other courts of general jurisdiction. *Sloan v. Lewis*, 22 Wall. 150; Law Ed. 22, 832; *Chapman v. Brewer*, 114 U. S. 158; Law Ed. 29, 83.

To same effect and that the bankruptcy court is always open to re-examine its decrees in any appropriate application, and any order may be vacated on a proper showing, vested rights under it being protected. *Graham v. Boston, H. & E. Ry.*, 118 U. S. 161; Law Ed. 30, 196.

#### *New Promise.*

A verbal promise by the insolvent pending his application for discharge, to pay certain of his creditors in full in consideration that they will not oppose his discharge is sufficient to invalidate the discharge. Such an agreement is a "pecuniary consideration." *Estudillo v. Meyerstein*, 72 Cal. 317.

The theory of some cases to the effect that a new promise con-

stitutes a new debt, or in other words, that it creates the real cause of action in a suit to recover the debt was held to be unsound, and that the action should be based on the original debt and that the new promise be relied upon as evidence to show that the debt is not barred. The new promise need not be alleged—it is matter of evidence to be used in the event that the statute of limitations is pleaded in bar. That the same rule holds where a new promise is relied on to obviate a discharge in insolvency. The action should be founded on the original debt, and if the discharge is pleaded, the new promise may be proven to show that the discharge had been waived. *Smith v. Richmond*, 19 Cal. 477. But that case is overruled, especially in so far as it relates to the action being founded on the original debt, and the application of the statute of limitations, and by overruling the doctrine that the action should be based upon the old debt and not upon the new promise, the later authorities would appear to be as applicable to the new promises of an insolvent debtor as to any other. Since it was held also in *Smith v. Richmond*, *supra*, and we think correctly, that the discharge in insolvency is only a release from the legal liability to pay the debt, and does not so destroy the existence of indebtedness as to render it incapable of being the consideration for a new promise. See *McCormick v. Brown*, 36 Cal. 185; *Farrell v. Palmer*, *Id.* 188; *Chabot v. Tucker*, 39 *id.* 438; and see the opinion in *Smith v. Richmond*, 15 Cal. 502.

A debt barred by a discharge in insolvency is a good consideration for a subsequent express promise to pay the same. A verbal promise is sufficient. *Feeney v. Daley*, 8 Cal. 84.

A promise to pay a debt after discharge in insolvency need not be in writing. *Henley v. Lanier*, 15 B. R. 280.

A promise in a letter, as follows: "Be satisfied, I intend to pay all my just debts; all will be right betwixt me and my creditors," *Held*, not a promise to pay a particular debt. *Allen v. Ferguson*, 18 Wall. 1; Law Ed. 21, 854.

The two years time provided in the Bankruptcy Act within which suits may be brought by or against an assignee commence to run when the assignee is appointed. *International Bank v. Sherman*, 101 U. S. 403; Law Ed. 25, 866.

And a debt is "property" to which the limitation clause for bringing actions will apply. *Jenkins v. International Bank*, 106 U. S. 571; Law Ed. 27, 304.

The right of a purchaser from the assignee is barred in the

same time the assignee is. *Gifford v. Helms*, 98 U. S. 248; *Law Ed.* 25, 57.

But it is said in *Upton v. McLaughlin*, 105 U. S. 640; *Law Ed.* 26, 1197, that the act does not impose an absolute limit of two years after the appointment of the assignee in bankruptcy to his right of action in respect to transactions which occurred before his appointment, and there is no want of power in the court to entertain a suit after the lapse of two years. Like any other statute of limitations it should be pleaded against the assignee at the proper time and not be raised for the first time in the appellate court. And it is generally held that where fraud is the basis of the action the bar does not commence to run until the discovery of the fraud, and this is equally applicable to suits at law or in equity. *Bailey v. Glover*, 21 Wall. 342; *Law Ed.* 22, 636; *Rosenthal v. Walker*, 111 U. S. 185; *Law Ed.* 28, 395; *Traver v. Clews*, 115 *id.* 528; *Law Ed.* 29, 467.

SECTION 58. The refusal of a discharge to the debtor shall not affect the administration and distribution of his estate under the provisions of this act.

This section is the same as 54 of the Act of 1880.

## ARTICLE VIII.

### FRAUDULENT PREFERENCES AND TRANSFERS.

SECTION 59. If any debtor being insolvent, or in contemplation of insolvency, within one month before the filing of a petition by or against him, with a view to give a preference to any creditor, or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered or seized on execution, or makes any payment, pledge, mortgage, assignment, transfer, sale, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, to any one, the person receiving such payment, pledge, mortgage, assignment, transfer, sale or conveyance, or to be benefited thereby, or by such attachment or seizure, having reasonable cause to believe that such debtor is insolvent, and that such attachment, seizure, payment, pledge, mortgage, conveyance, transfer, sale or assignment, is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in any way hinder, impede, or delay the operation of, or to evade any of the provisions of this act, such attachment, sequestration, seizure, payment, pledge, mortgage, transfer, sale, assignment or conveyance is void, and the assignee, or the receiver, may recover the property, or the value thereof as assets of such insolvent debtor; and if such payment, pledge, mortgage, conveyance, sale, assignment or transfer is not made in the usual and ordinary course of business of the debtor or if such

seizure or sequestration is made under a judgment which the debtor has confessed or offered to allow, that fact shall be *prima facie* evidence of fraud. All assignments, transfers, conveyances, mortgages or incumbrances of real estate shall be deemed, under this section, to have been made at the time the instrument conveying or affecting such realty was filed for record in the county recorder's office of the county, or city and county, where the same is situated.

This section corresponds to section 55 of the Act of 1880, but there are quite a number of differences, which can only be properly understood by an inspection of the two sections. The words "mortgage," "pledge," "sale," "sequestration" and a few others employed here, and the closing sentence of this section were not in the former.

The filing of the petition is the commencement of proceedings. *Crawford v. Maddux*, 100 Cal. 224.

A transferee of an insolvent debtor, will be charged with notice of such insolvent condition, or with "reasonable cause to believe" if he knows sufficient to put him upon inquiry, which, if prosecuted by him, would have disclosed the debtor's insolvency. *Washburn v. Huntington*, 78 Cal. 573.

Insolvency being admitted, and granting the intent to prefer one creditor over another, and knowledge on the part of the vendee, the Insolvent Act will avoid the contract, (Sec. 55, Act of 1880) even though the purchaser paid full value for the property, where the transaction occurs within thirty days of the filing of a petition in insolvency. In such case it is error to instruct the jury that a debtor may pay or secure one creditor in preference to another. *Tapscott v. Lyon*, 103 Cal. 297.

A sale made to hinder, delay, or defraud creditors, is absolutely void, and the receiver appointed in insolvency proceedings is authorized to institute suit to recover the property. *Id.*

It was held in *Dana v. Stanford*, 10 Cal. 269, that the 39th section of the Insolvency Act of 1852, prohibiting assignments for the benefit of creditors, other than such assignments as were provided for by that act, was not intended to prohibit an insolvent debtor from transferring property directly to his creditor, either absolutely in payment of his debt or as security by way of mortgage, but it did do away with assignments creating a trust for the benefit of creditors generally. It was further said that a conveyance directly to the creditor with power to sell and apply the proceeds to the payment of his demand was but a mortgage whatever its form, and was not within the inhibition of the insolvency statute. It was further said that the policy of that statute was not to prevent the payment of one debt rather than

another. That case involved a mortgage executed by a person who was confessedly insolvent, upon all of his property and effects to certain specified creditors, to secure his indebtedness to them, and to protect them from liabilities incurred by their indorsement of his paper; and it was held that such mortgage was not prohibited and that it did not create a trust prohibited by the statute of frauds. This case has been frequently cited and approved since. Among other instances see *Randall v. Buffington*, 10 Cal. 494; *Wellington v. Sedgwick*, 12 *id.* 474; *Gladwin v. Garrison*, 13 *id.* 332; *Wheaton v. Neville*, 19 *id.* 46; *Walden v. Murdock*, 23 *id.* 550; *Lawrence v. Neff*, 41 *id.* 570; *Ross v. Sedgwick*, 69 *id.* 247; *Saunderson v. Broadwell*, 82 *id.* 132.

This rule and the cases cited are to be distinguished, however, from the rule prescribed by sections 49, 55 of the Insolvent Act of 1880, relating to payments, transfers, etc., within one month prior to proceedings under that act, and from the decisions of the courts under those sections, but may be applied to cases involving the construction of sections 3432 and 3439 of our Civil Code. And in this connection see dissenting opinion of Paterson, J., in *Francisco v. Aguirre*, 94 Cal. 187; *Bull v. Bray*, 89 *id.* 286; *Mason v. Vestal*, 88 *id.* 396, and the cases cited. And see the later case of *Tapscott v. Lyon*, 103 Cal. 297.

It was said in *Groschen v. Page*, 6 Cal. 139, that a partial assignment was equally void as a general one, and it was held that an assignment for the benefit of certain parties who had undertaken to guarantee the payment of such creditors of the assignor as consented to an extension of time or a substitution of security was void. *Dana v. Stanford* reviews the earlier cases in this state and numerous decisions of other states up to that time.

A delivery of a deed made to hinder or delay creditors shortly before instituting insolvency proceedings, and recorded, is fraudulent whether the deed was actually delivered to the grantee named or not; the property also having been omitted from the schedule and inventory. *Fisk v. His Creditors*, 12 Cal. 281.

A transfer by a retail merchant of his entire stock in trade is not in "the usual course of business." And in a controversy arising therefrom the burden of proof as to the fraud of the transaction is shifted to the purchaser to show that he was not aware of the intent of the vendor to make a preference forbidden by the Insolvency Act. *Tapscott v. Lyon*, 103 Cal. 297.

A sale made seven days before filing of the petition with intent to give a preference to one creditor and prevent the property from going into the hands of an assignee in insolvency, and knowledge

on the part of the vendee, renders the transfer void, even though the vendee paid full value for the goods, and the proceeds were applied to the satisfaction of an honest debt. *Id.*

Where it is found that the transfer by a debtor to his creditor was not made in the usual course of business, this is *prima facie* evidence that it was made in contravention of the provisions prohibiting a preference, but this *prima facie* case is overcome when the evidence also shows that neither of the parties to the transfer had any intention of creating a preference to one creditor over others, and that they contemplated that all creditors would be treated alike. The question of intent to give a preference is one of fact and not a question of law. *Haas v. Whittier*, 97 Cal. 411. See this case also for instructions and special findings.

Orders given by a debtor upon his book account debtors, in favor of a particular creditor, constitute an assignment out of the usual and ordinary course of business of the debtor, and such assignments are *prima facie* fraudulent within the meaning of the act. *Washburn v. Huntington*, 78 Cal. 573.

A transfer not made in the usual course of business is only *prima facie* evidence of fraud, that may be overcome by proof of good faith and want of knowledge on the part of a creditor accepting the same. *Bernheim v. Christal*, 76 Cal. 567.

A person who buys goods from an insolvent not in the ordinary course of trade, will be chargeable with notice of his insolvency, and that the sale was made to hinder and delay creditors. And in an action by the assignee to recover the property, the notice to creditors is sufficiently established as against the defendant, by the recitals in the order appointing the assignee. *Ohlleyer v. Bunce*, 65 Cal. 544.

#### *Actions by Assignee.*

Prohibition will not lie against an assignee in insolvency to prevent his prosecution of an action to recover property alleged to have been transferred by insolvent partners to give a preference, and which the assignee claims vested in him through the insolvency proceedings, and it is immaterial whether the insolvency proceedings were voluntary or involuntary, or whether the assignee appointed therein acquired the title of the insolvent firm. *Godard v. Superior Court*, 90 Cal. 364.

A transfer made by an insolvent within one month prior to his petition, and accepted by a creditor as a preference cannot be set aside at the suit of a judgment creditor of the insolvent as a fraud upon other creditors, but such conveyance (made within

the month) is subject to be set aside at the suit of the assignee. *Priest v. Brown*, 100 Cal. 626.

The assignee is not authorized to recover property transferred by the insolvent partnership within one month prior to the filing of a petition in involuntary insolvency when it is shown that the transfer was made to secure the transferee for advances to be made by him in payment of notes given by the firm and on which the firm had incurred criminal liability and while the transferee had no knowledge of nor reason to believe the insolvent condition of the firm, and had no knowledge of any fraud attending the transaction. *Matter of Weirbitzky*, 96 Cal. 310.

Where the trial court found that a transfer was made within a month prior to filing a voluntary petition, but that the person receiving it did not believe nor have reason to believe at or before the time he took the assignment that the assignors were insolvent, or that the assignment was made by them with a view to prevent the property conveyed from coming into the hands of the assignee, or to prevent it from being distributed among creditors or to defeat the object of the Insolvent Act, and where the transfer was made in payment of a debt, it was error to give judgment in favor of the assignee in an action by him to recover the property. *Haskin v. James*, 96 Cal. 258.

Case where the evidence was held sufficient to sustain findings of a transfer in fraud of creditors, and recovery by the assignee sustained. *Seligman v. Armando*, 94 Cal. 314.

The fraud here contemplated seems to have reference to frauds which affect the mass of creditors, and not such as affect some particular creditor, and section 52 (Act of 1880) seems to contemplate that a discharge may be granted, notwithstanding there may be some debt which should be excepted from its operation. A discharge will not be denied because there is some debt which had been contracted in fraud. As to such debt the discharge will not be effectual. *Siegel v. His Creditors*, 95 Cal. 409; *Dyer v. Bradley*, 89 Cal. 557; *In re McEachran*, 82 Cal. 219; *Herrlich v. McDonald*, 80 Cal. 472.

Pleadings on behalf of assignee are subject to the rules applicable to other persons. Where facts are within his knowledge, or must be presumed to be, his allegations and denials should be direct and positive, and not upon information or belief. *Gribble v. Columbus Brewing Co.*, 100 Cal. 67.

Where insolvency is admitted, and the creditor to whom property is transferred by the insolvent knows that he is receiving a preference, the general rule permitting preferences does not



apply, and the property so transferred may be recovered by the receiver or assignee in insolvency. *Tapscott v. Lyon*, 103 Cal. 297.

In an action by the assignee in insolvency to recover the value of property transferred by the insolvent within thirty days prior to the filing of the petition by creditors against him, a finding that the defendants neither knew nor believed, nor had reasonable cause to believe that the debtor was insolvent, or that the conveyance was made in contemplation of insolvency, is sufficient to sustain a judgment for the defendants. *Smith v. Fratt*, 104 Cal. 266.

The levy of the execution upon personal property prior to insolvency proceedings, prevents such property from coming to the hands of the assignee. *Vermont Marble Co. v. Superior Court*, 99 Cal. 579.

The certified copy of the assignment to the assignee is made conclusive evidence of his authority to sue, and that having been introduced in an action by him to recover goods alleged to have been fraudulently transferred by the insolvent debtor, the fact that the bond given by the assignee was signed only by the sureties and not by himself, does not destroy the rule of evidence thus declared as to the assignment. *Fitzgerald v. Neustadt*, 91 Cal. 601.

In an action by the assignee to recover goods fraudulently transferred by the insolvent it is not necessary that the judgment should be in the alternative, where the goods have been mixed beyond identification with other goods of the fraudulent purchaser. *Seligman v. Armando*, 94 Cal. 314.

Marriage is sufficient consideration, and a conveyance by a father to his daughter in consideration of her marriage, he believing he was able to pay all his debts and not contemplating insolvency, and the daughter having no knowledge or suspicion of his insolvency, is valid against creditors, although the grantor was in fact insolvent at the time of the conveyance. *Cohen v. Knox*, 90 Cal. 266.

Where the assignee in insolvency relies solely upon want of change of possession in an action to recover personal property previously conveyed to a creditor by the insolvent debtors, the removal of the property by the vendee from one of his ranches to another sufficiently shows such change. *Hogan v. Cowell*, 73 Cal. 211.

A sale of personal property without an immediate and con-

tinued change of possession is void as against the assignee in insolvency of the vendor. *Merrill v. Hurlburt*, 63 Cal. 494.

Under section 3440 Civil Code, a sale of personal property not accompanied by immediate and continued change of possession is void as to the assignee in insolvency of the vendor. *Brown v. Bank of Napa*, 77 Cal. 544.

In an action by an assignee in insolvency, the complaint should allege an assignment to him. Without the assignment the property would still belong to the insolvent. *King v. Felton*, 63 Cal. 66.

The following allegation in complaint by assignee to recover goods alleged to have been fraudulently transferred by the insolvent debtor, is sufficient as showing the financial condition of the insolvent at the time of the alleged sale. "That at the time of the attempted sale of his said stock of goods, etc., above described, as hereinafter stated, and for a long time prior thereto, the said J. G. was, and ever since has been, indebted to various persons in large sums of money, and during all said times was, and still is unable to pay his debts from his own means as said debts became due, and then was and still is an insolvent debtor," etc. *Fitzgerald v. Neustadt*, 91 Cal. 600.

A complaint by the assignee to recover property alleged to have been fraudulently transferred, which alleges that certain personal property belonged to the insolvent; that the same was wrongfully omitted from the schedule of assets; that the defendant wrongfully and without consent of plaintiff came into possession of the same, and retained it, claiming to own it, and had no title or right to possession thereof, but that the same was the property of the estate of the insolvent, and that plaintiff as assignee was the owner and entitled to possession of the same; that demand had been made and refused, states a cause of action which does not depend upon the ground of fraud, and is sufficient without any allegation of fraud. *Cady v. Leonard*, 81 Cal. 622.

A complaint by attaching creditors to set aside certain judgments by confession made by the insolvent debtor, and also his proceedings in insolvency for fraud, is insufficient unless it alleges that the debts confessed were not justly due. An allegation that the confessions were pretended and fraudulent as to other creditors is insufficient. *Pehrson v. Hewitt*, 79 Cal. 594.

Demand need not be alleged by the assignee in an action to recover money unlawfully paid by the insolvent to give a preference. It is the duty of the assignee to recover the entire estate for the benefit of creditors. *Bull v. Houghton*, 65 Cal. 422.

It was held that the complaint of an assignee in bankruptcy in an action to recover property belonging to the bankrupt's estate need not allege the bankruptcy of the bankrupt, nor the appointment of the plaintiff as assignee, but it was sufficient to allege that the plaintiff was the owner of the property, and that the facts by which the assignee acquired the property are not ultimate but probative facts. *Daubmann v. White*, 48 Cal. 439.

An action by the assignee of an insolvent to set aside a sale at auction made by the assignee, on the ground of conspiracy among bidders to prevent competition, and that the purchaser at the sale had conspired with others and the sum bid was grossly disproportionate to the value of the property sold, should be brought in a reasonable time. A delay of a year and a half will be fatal to the action, where there is no averment that the assignee did not have knowledge of the facts during that time. *Hammond v. Wallace*, 85 Cal. 522.

Unless the debtor transferred the property within one month prior to filing the petition with the intention to give preference to some creditor or person having a claim against him, it makes no difference what were the views or motives of the creditor in receiving the property, or what he suspected or believed about the solvency of the debtor. *Haas v. Whittier, Fuller & Co.*, 87 Cal. 613.

If judgments confessed are for debts justly due; it is not fraudulent for the judgment creditors to promise to buy in the property sold in satisfaction of the judgments and give it to the debtor. A proceeding in insolvency to carry out such arrangement is not fraudulent as to other creditors. *Pehrson v. Hewitt*, 79 Cal. 594.

Wool coming into the hands of the assignee in insolvency before removal, cannot be recovered from him by a creditor of the insolvent to whom the insolvent was indebted for rent and under agreement to ship the wool to the lessor at some other place, there to be taken by the lessor and sold and the rents to be retained from the proceeds. Under such agreement the lessor had no lien. *Hitchcock v. Hassett*, 71 Cal. 331.

The preference of a creditor by payment at a time when the debtor did not know he was insolvent and did not contemplate insolvency, is no bar to his discharge. *Matter of Harris*, 81 Cal. 350.

Where a horse and buggy is transferred on Sunday to a creditor who is informed by the debtor that he has been attached and expects further attachment proceedings to follow, and the creditor admits that he took the property to save himself, without driving or trying the horse, the transfer is not one in the

usual course of business, and is therefore *prima facie* evidence of fraud. The creditor was at least "put upon notice" as to the insolvent condition of his debtor. *Godfrey v. Miller*, 80 Cal. 420.

If confessed judgments are prohibited by the Insolvent Act, the assignee in insolvency can have them adjudged void upon proper proceeding for that purpose; but attaching creditors cannot attack them in equity, if they were confessed for debts justly due. *Pehrson v. Hewitt*, 79 Cal. 594.

Where a transfer is made by a debtor and received by a creditor with a view to give a preference, within one month prior to proceedings in insolvency, and the transferee has reasonable cause to believe the latter is insolvent and the transfer is made to prevent the property coming to the assignee, or to prevent its distribution, etc., the assignee may recover the property without proving a demand therefor. *Cerf v. Phillips*, 75 Cal. 185.

A deed executed within thirty days prior to insolvency proceedings, in pursuance of an agreement made five months previously, should in the absence of fraud be treated as given at the time of the agreement, and if given as security for an antecedent debt it will be treated as a mortgage. *Broughton v. Vasquez*, 73 Cal. 325.

The transferee of an insolvent is not entitled to re-imbursement for purchase money paid by him to the insolvent in a case where the assignee is entitled to recover the property from such transferee. *Burke v. Koch*, 75 Cal. 356.

Where one of the plaintiffs in an action becomes insolvent, it is not necessary that his assignee should be substituted in his place. *Stewart v. Spaulding*, 72 Cal. 264.

The assignee in insolvency is a proper party defendant in an action by a purchaser at execution sale to set aside a conveyance alleged to have been made by the debtor in fraud of creditors and purchasers. *Pfister v. Dasey*, 65 Cal. 403.

Where money belonging to the insolvent's estate is in the hands of persons examined by the court and the fact is admitted, the court may order it paid to the assignee, but if in the hands of persons claiming an interest, the assignee will be driven to his action to recover it. *Goodday v. Superior Court*, 65 Cal. 580.

In a case of voluntary insolvency under the Act of 1852, the assignee received money from the sheriff belonging to the insolvent. The petitioner having been denied the benefit of the act, *Held*, the court properly ordered the money returned to the sheriff. *Appel v. Creditors*, 57 Cal. 211.

Under the Bankruptcy Act of 1867, a creditor who has proved his debt is deemed to have waived his right of action against the bankrupt and cannot maintain such action. The intent of the act is that the federal courts shall have the exclusive control of and distribute the assets of the bankrupt. *Wilson v. Capuro*, 41 Cal. 545.

The question of fraud in making a sale is one of fact to be passed upon by the jury. *Wellington v. Sedgwick*, 12 Cal. 470; Civil Code, Sec. 3442.

Evidence examined and held that a gift of land by husband to his wife was not made with intent to defraud. *Knox v. Moses*, 38 Pac. Rep. 318. (Cal.)

Whether a gift by an insolvent was fraudulent is a question of fact. *Id.*

#### *Miscellaneous Cases.*

Where a person is heavily indebted and conveys all his property in trust for himself and his children, the inference of a fraudulent intent is irresistible. *Judson v. Lyford*, 84 Cal. 505.

A deed purporting to convey land to which the grantor had no title will not be set aside at the instance of his creditors on the ground that it was fraudulent as to them. *Dauglarde v. Elias*, 80 Cal. 65.

The finding that a mortgage was without consideration is not equivalent to and is insufficient without a finding that it was fraudulent. *Bewick v. Muir*, 83 Cal. 368.

Where the facts are such that the jury would be justified in inferring fraud, the party alleging fraud is entitled to instructions fully stating the law applicable to fraudulent transfers. *Sukeforth v. Lord*, 87 *id.* 399.

There can be no fraud in the pursuing a remedy allowed by law. *Pehrson v. Hewitt*, 79 *id.* 594.

Deceit without injury is not cause for relief on the ground of fraud. *Baker v. Brown*, 82 *id.* 64.

Where confessions of judgments are prohibited by the Insolvent Act the assignee in insolvency can have them adjudged void upon proper proceedings for that purpose; but creditors cannot assail them in equity, if the judgments confessed were for debts justly due. *Pehrson v. Hewitt*, 79 Cal. 594.

A preferential conveyance will be set aside as void though it be of property which could have been set aside as a homestead. *La Point v. Blanchard*, 101 Cal. 549.

Proof of fraudulent intent on the part of the donor is sufficient

to avoid the deed, as against an innocent donee. *Swartz v. Hazlett*, 8 *id.* 118.

A conveyance of property made and received with intent to defraud creditors is void although full valuable consideration was paid. The fraud vitiates it, and it will not be allowed to stand even for advances actually made. *Sorinford v. Rogers*, 23 Cal. 36.

A conveyance although made to defraud creditors may be good as to all the world except creditors of the grantor. It is good as against subsequent purchasers from the grantor, unless they buy without notice and for a valuable consideration. *Lawton v. Gordon*, 34 *id.* 36.

If A, when solvent, conveys his personal property to B for the purpose of defrauding his creditors, and B has knowledge of the facts, and A is afterwards, on petition of creditors, declared a bankrupt, the sale will be declared void, and the title thereto vests in the assignee in bankruptcy, when appointed, and he can recover the same. *Bolander v. Gentry*, 41 *id.* 545.

A deed of trust, made by a debtor in favor of his wife at a time when he is insolvent, and his property under attachment, is fraudulent and void as to creditors. *Burpee v. Bunn*, 22 *id.* 194.

A mortgage knowingly given for a greater sum than is due, and not in good faith, as a pretended security for future advances, is fraudulent in law as to the creditors of the mortgagor, but if given in good faith, it is not fraudulent because of failure to state upon its face that the excess is given to secure future advances. *Tully v. Harloe*, 35 *id.* 302.

If the creditors of a failing debtor agree between themselves, with the assent of the debtor, to a composition of their respective debts, and to receive in lieu thereof securities of a certain character, and one of the creditors subsequently obtains from the debtor new notes, of a character more favorable to the creditor than those provided for in the composition agreement, such new notes are void for fraud, not only as to the other creditors, but as to the assenting debtor. *Smith v. Owens*, 21 *id.* 11.

A transfer, with knowledge of insolvency is not rendered valid because taken in payment of a debt of trust. *Godfrey v. Miller*, 80 Cal. 420.

The question of fraudulent intent is one of fact, not of law. *Morgan v. Hecker*, 74 Cal. 540.

Cases where gifts by husband to wife have been sustained: *Kane v. Desmond*, 63 Cal. 464; *Wood v. Whitney*, 42 *id.* 361;

Peck v. Brummagim, 31 *id.* 440; Kohner v. Ashenaur, 17 *id.* 582; Wells v. Stout, 9 *id.* 497.

The fact that the purchaser of property from a person actually insolvent, having been formerly an agent or clerk of the latter, does not necessarily raise the inference that his purchase was fraudulent; *aliter*, if he is shown to have taken an unfair advantage of the knowledge afforded by his position, or if it appeared that he had no means to make the purchase. Kinder v. Macy, 7 *id.* 206.

Where actual fraud characterized the transfer, even though the fraudulent vendee paid out a large sum of money, he is not entitled to be re-imbursed by the creditors on the setting aside of the transfer. Burke v. Koch, 75 Cal. 359, and cases cited.

Orders drawn by creditors upon their debtor and accepted by him, operate as an assignment of so much of the debt, and a transfer by a debtor which is fraudulent as to the original creditors is fraudulent as to their assignee. Hobart v. Tyrrell, 68 Cal. 12.

The sale of all of a debtor's goods, with credit for the greater portion of the purchase price, does not establish fraud as a legal conclusion. Harris v. Burns, 50 *id.* 140.

Inadequacy or failure of consideration is not of itself sufficient, even as against the creditors of an insolvent assignor, to authorize a court to find fraud as a conclusion of law. Jamison v. King, 50 *id.* 132. But see section 3442, C. C., as amended in 1895. (Stats. Palm Ed. p. 154.)

It is never presumed that a party has committed a fraud; and where fraud is alleged for the purpose of depriving him of a right, it must be clearly made out. McCarthy v. White, 21 *id.* 495.

Testimony showing a fraudulent design in the vendor is admissible under allegations that a sale was made to defraud creditors, although it does not connect the purchaser with the fraud, or show that he was cognizant of the fraudulent design. Laudecker v. Houghtaling, 7 *id.* 391.

And where the fraudulent intent is the matter at issue, it is an issue of fact, to be tried as other issues of fact. Miller v. Stewart, 24 *id.* 502, and cases cited under section 3442 of Civil Code, "Fraudulent Conveyances," *ante*.

The statute does not contemplate conclusive proof of the intention to commit fraud. White v. Lezynsky, 14 *id.* 165.

The dealing to-day with property, as his property, by a vendor of a month ago, is evidence to show fraud committed in the sale

of a month ago. Subsequent acts are admissible as illustrative of the intent and character of the first. *Butler v. Collins*, 12 *id.* 45.

Cases as to change of possession and declarations of the vendor as to possession after sale of personalty. *Murphy v. Mulgrew*, 102 Cal. 547; *Dorman v. Soto*, 36 Pac. Rep. 588.

As against subsequent creditors, a conveyance, even if voluntary, is not void, unless fraudulent in fact; that is, made with a view to future debts; though the evidence of intent to defraud existing creditors is deemed sufficient *prima facie* evidence of fraud against subsequent creditors. *Horn v. Volcano Water Co.*, 13 *id.* 62.

Fraud may consist in the misrepresentation or concealment of material facts, and may be inferred from the circumstances and condition of the parties contracting. In order to sustain the allegations of fraud and deceit in contracting a debt, it is necessary to prove that the representations alleged to have been fraudulent and deceitful, were not true. *Belden v. Henriques*, 8 *id.* 87.

Even where there is no intention to deceive, there may be such an amount of gross carelessness as to constitute conclusive evidence of a fraudulent intent. *Alvarez v. Brannan*, 7 *id.* 503.

A slight mistake in the computation of interest, the date being given, is no evidence of fraud. *Scales v. Scott*, 13 *id.* 76.

It is not necessary that a fraudulent deed should have been recorded. The fraud can be as complete without delivery as with it. *Fisk v. His Creditors*, 12 Cal. 281.

A and B were partners, and as such, owned two tracts of land. A for several years resided upon one of the tracts with his family, using it as a homestead. The firm becoming embarrassed, they made a division of their lands, and B executed to A a deed of his interest in the homestead tract, and A executed to B a deed of his interest in the other tract.

These deeds were executed for the purpose of enabling A to file a declaration of homestead on the tract deeded to him, and thereby prevent his creditors from selling it in payment of their debts. A, soon after, executed and recorded a declaration of homestead on the land; *Held*, that the conveyances were fraudulent and void as to creditors, and that, notwithstanding the homestead claim, the land was still liable for the debts of the firm. *Bishop v. Hubbard*, 23 Cal. 514.

Where, on the trial of an issue of fraud, on the ground that a certain judgment confessed by B to plaintiff was fraudulent as against the creditors of B, evidence that on the day of the confession of judgment to plaintiff, and in the same court, B con-



fessed other judgments, one to G, and another to F and G, the papers therefor, in the three cases, being all prepared by the same attorneys, was properly admitted to show that the confessions of the three judgments were but parts of one transaction and in pursuit of a common purpose; and such evidence would, therefore, be properly retained or excluded from consideration accordingly as defendant, who offered the same, succeeded or failed in adducing any proof that said judgments to G, and F and G, were confessed for a like fraudulent purpose.

If there was any proof whatever it would be for the jury, otherwise for the court, on motion to strike out. *King v. Davis*, 34 Cal. 100.

Under section 8 of the Insolvent Act as amended in 1876, which declared void all assignments of the debtors property within two months prior to insolvency proceedings, it was held erroneous to instruct that a failure to comply with said section would avoid the insolvents discharge, since the only penalty prescribed by that section was a recovery of the property by the assignee. In such case the sole question for the jury was whether the insolvent having had the benefit of the insolvent act, had concealed any part of his property or estate, or given, knowingly, a false schedule or committed any fraud in contravention of the act. *Dean v. Grimes*, 72 Cal. 442.

A debtor of the insolvent purchased a demand against the insolvent ten days before the filing by the insolvent of his petition in voluntary insolvency. *Held*, the demand purchased could be offset by the purchaser against his debt to the insolvent in an action by the assignee, although he knew of the insolvent's condition when he purchased the demand. *Conroy v. Dunlap*, 37 Pac. Rep. 887. (Cal.)

An assignee takes the estate of the insolvent subject to all the rights and equities of third persons attached to it in the hands of the insolvent. As to bills, accounts and similar choses in action the code does not require an actual and continued change of possession. (C. C. Sec. 3440.) And such accounts left in the hands of the assignor of them for collection do not pass to his assignee in insolvency, and cannot be recovered by the latter where there is no claim of fraud in the transfer. *Kirk v. Roberts*, 31 Pac. Rep. 620. (Cal.)

The Act of 1852, and section 8 of Supplemental Act of 1876 construed and, *Held*, the mere giving of a preference to one creditor, without intent to delay or defraud others, is not of itself, and independent of the act, a fraud. The penalty imposed by

section 8 of the Act of 1876, for an assignment by the debtor within two months prior to filing his petition is, that it is void, and the assignee may recover the property. The penalty imposed upon an attempt to prefer a creditor within four months, is, the recovery by the assignee of the property attempted to be transferred. Construing section 32 of the Act of 1852 and section 8 of the Act of 1876 together, still, to constitute fraud, as against a creditor, which can be asserted after a discharge has been granted, it must at least be made to appear that the assignment was not made in the usual course of business of the debtor. *Dean v. Grimes*, 72 Cal. 442.

*U. S. Supreme Court Decisions.*

A fraudulent purchaser held not to acquire title to the property, and his creditor has no cause of complaint, where the identity of the property is not lost, upon its return to the seller. *Montgomery v. Bucyrus M. Works*, 92 U. S. 257; Law Ed. 23, 656.

A creditor cannot assert any right to property fraudulently transferred by the bankrupt—the right passes to the assignee. *Trimble v. Woodhead*, 102 U. S. 647; Law Ed. 26, 290.

It was held that the first clause of section 35 of the United States Bankrupt Act of 1867, avoiding certain acts done within four months before filing the petition, refers to acts the consideration of which grew out of a former transaction; while the second clause avoiding acts done within six months previous was limited to cases where the transaction was original and complete in itself at the time it occurred, and had no reference to anything between the parties, which had gone before it. [The first clause referred to is the same as section 55 of the California Act of 1880, and section 59 of the present act; and the second clause (Section 5129 Revised Statutes) corresponds with the latter of said sections. But these sections have omitted any such distinction as to time as four and six months. The distinction between making a payment or procuring his goods to be attached, etc., which relate to an antecedent or subsisting indebtedness, or the attempt to make a preference only and a transfer, confession or attachment where no previous obligation existed, and which are intended to defeat the objects of the insolvency law, are quite apparent though the same penalty and the same time be applied to each.] *Gibson v. Warden*, 14 Wall. 244; Law Ed. 20, 797.

And the day on which the petition in bankruptcy was filed was excluded in computing the four months within which a

fraudulent preference was to be regarded as having been made. *Dutcher v. Wright*, 94 U. S. 553; Law Ed. 24, 130.

In order to prove that a sale was made in contemplation of insolvency, evidence may be given of a prior sale by the same party, accompanied by a secret agreement re-investing the seller with one-half of the property sold. *Rosenthal v. Walker*, 111 U. S. 185; Law Ed. 28, 395.

When the issue to be decided is whether a judgment against a debtor was obtained with a view to give a preference, the intention of the bankrupt is the turning point of the case, and all the circumstances which go to show such intent should be considered. *Little v. Alexander*, 21 Wall. 500; Law Ed. 22, 625.

And very slight evidence, of an affirmative character, of the existence of a desire to prefer one creditor, or of acts done with a view to such preference, may be sufficient under the Bankrupt Act to invalidate a transaction. *Sage v. Wyncoop*, 104 U. S. 319; Law Ed. 26, 740.

The bankrupt law did not prevent an insolvent person from dealing with his property—selling or exchanging for other property—at any time before proceedings in bankruptcy were taken by or against him, provided such dealings were conducted without any purpose to delay or defraud his creditors, or to give a preference to any one, and did not impair the value of his estate. *Clark v. Iselin*, 21 Wall. 360; Law Ed. 22, 568; *Cook v. Tullis*, 18 *id.* 332; Law Ed. 21, 933; *Bernhisel v. Firman*, 22 *id.* 170; Law Ed. 22, 766; *Sawyer v. Turpin*, 91 U. S. 114; Law Ed. 23, 235; *Stewart v. Platt*, 101 *id.* 731; Law Ed. 25, 816.

Advances may be made in good faith to a debtor to carry on his business, no matter what his condition may be, and the party making such advances may lawfully take securities at the time for their repayment, without violating the bankrupt law. *Tiffany v. Boatman's Sav. Inst.*, 18 Wall. 375; Law Ed. 21, 868.

For other transactions held not in violation of bankrupt law, see the cases of *Hanselt v. Harrison*, 105 U. S. 401; Law Ed. 26, 1075; *Bacon v. International Bank*, Law Ed. 26, 439.

And payments made by a debtor while probably insolvent, but at a time when he did not anticipate any interruption to his business and while he was planning its enlargement, to a creditor who neither knew, nor had reason to believe his debtor to be insolvent, was not void under the bankrupt law. *Clark v. Iselin*, 21 Wall. 360; Law Ed. 22, 568.

Under the United States Bankrupt Act of 1867, the payment of a debt or the transfer of goods by an insolvent, with intent to

give a fraudulent preference to a party who has reasonable cause to believe the debtor insolvent, is void, if made within four months before proceedings in insolvency. *West Phila. Bank v. Dixon*, 95 U. S. 180; Law Ed. 24, 407.

But to authorize the assignee to recover money or property under section 35, of said act, he must establish not only the act of the bankrupt of which he complains, but also that it was done to give a preference over other creditors, and that the other party to the transaction had reasonable cause to believe such person was insolvent. *Mays v. Fritton*, 20 Wall. 414; Law Ed. 22, 389; *Michaels v. Post*, 21 *id.* 398; Law Ed. 22, 520.

And a deed could be avoided as an unlawful preference under the bankrupt law, only in the case of voluntary, and not compulsory bankruptcy. It was held not a case of voluntary bankruptcy where one is forced into it against his will by the action of his partner in which he refused to join. *Metsker v. Bonebrake*, 108 U. S. 66; Law Ed. 27, 654.

Equity will not interfere to prevent an insolvent debtor from alienating his property to avoid an existing or prospective debt, even when there is a suit pending to enforce it. *Adler v. Fenton*, 24 How. U. S. 407; Law Ed. 16, 696.

Under the Bankrupt Act of 1867, an assignment for the benefit of creditors without preferences, under a state statute, was an act of bankruptcy, for which the assignor could be adjudged a bankrupt, and the property taken for administration in the bankruptcy court. *Boese v. King*, 108 U. S. 379; Law Ed. 27, 760. But see *Mayer v. Hellman*, 91 U. S. 496; Law Ed. 23, 377.

Under the Bankrupt Act, the mere submission of a debtor to the obtaining of judgment against him and levy of execution was not sufficient to invalidate the lien of the judgment and levy. To render the transaction unlawful, the debtor must have been insolvent, or contemplating insolvency at the time, and he must have procured the judgment and execution with a view to give a preference, within four months before filing the petition in bankruptcy, and the creditor must have had reasonable cause to believe that the debtor was insolvent, and that the judgment and execution were given in fraud of the provisions of the Bankrupt Act. *Michaels v. Post*, 21 Wall. 398; Law Ed. 22, 520.

Ordinary prudence is required of a creditor to ascertain his debtor's solvency, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired if he had investigated. *Buchanan v. Smith*, 16 Wall. 277; Law Ed. 21, 280.

The knowledge of the plaintiff's attorney is the knowledge of the plaintiff, where the question is whether the plaintiff in a judgment on which goods were taken on execution knew of the defendant's insolvency and attempt to evade the bankrupt law. *Rogers v. Palmer*, 102 U. S. 263; Law Ed. 26, 164.

When the condition of a debtor's affairs are such that prudent business men would conclude that he could not meet his obligations as they matured in the ordinary course of business, there is reasonable cause to believe him insolvent. *Mer. Nat. Bank of Cincinnati v. Cook*, 95 U. S. 342; Law Ed. 24, 412.

But a creditor dealing with a debtor whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or security without violating the bankrupt law, although he is unwilling to trust him further, and is anxious about his claim, and has a strong desire to secure it; if such belief of insolvency as the act requires is wanting, obtaining additional security or receiving payment is not prohibited by law. *Stucky v. Masonic Sav. Bank*, 108 U. S. 74; Law Ed. 27, 640.

It is not enough that the creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief, to invalidate a security taken for his debt. *Grant v. First Nat. Bank*, 97 U. S. 80; Law Ed. 24, 971.

## ARTICLE IX.

### PENAL CLAUSES.

SECTION 60. From and after the taking effect of this act, if any debtor or insolvent shall, after the commencement of proceedings in insolvency, secrete or conceal any property belonging to his estate, or part with, conceal or destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated or falsified, any book, deed, document or writing relating thereto, or remove or cause to be removed, the same or any part thereof, with intent to prevent it from coming into the possession of the assignee in insolvency, or to hinder, impede, or delay his assignee in recovering or receiving the same, or make any payment, gift, sale, assignment, transfer or conveyance of any property belonging to his estate, with like intent, or shall spend any part thereof in gaming; or shall, with intent to defraud, willfully and fraudulently conceal from his assignee, or fraudulently or designedly omit from his schedule any property or effects whatsoever; or if, in case of any person having, to his knowledge or belief, proved a false or fictitious debt against his estate, he shall fail to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or shall attempt to account for any of his property by fic-

titious losses or expenses; or shall, within three months before commencement of proceedings of insolvency, under the false pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels, with intent to defraud; or shall, with intent to defraud his creditors, within three months next before the commencement of proceedings in insolvency, pawn, pledge, or dispose of, otherwise than by *bona fide* transactions in the ordinary way of his trade, any of his goods and chattels which have been obtained on credit, and remain unpaid for, he shall be deemed guilty of misdemeanor, and upon conviction thereof, shall be punished by imprisonment in the county jail for not less three months nor more than two years.

This section is the same as 56 of the Act of 1880.

Section 154 Penal Code. "Every debtor who fraudulently removes his property or effects out of this state, or fraudulently sells, conveys, assigns, or conceals his property, with intent to defraud, hinder or delay his creditors of their rights, claims or demands, is punishable by imprisonment in the county jail, not exceeding one year, or by fine not exceeding five thousand dollars, or by both."

Section 132 Penal Code. "Every person who upon any trial, proceeding or inquiry, or investigation, whatever, authorized or permitted by law, offers in evidence, as genuine or true, any book, paper, document, record or other instrument in writing, knowing the same to have been forged or fraudulently altered or antedated, is guilty of a felony." See also sections 133, 134, 135, *Id.*

It will be presumed that the insolvent debtor is innocent of crime or wrong. That he intended the ordinary consequences of his own act. That his private transactions have been fair and regular. That the ordinary course of business has been followed. Code C. P., section 1963.

The jury is not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds. *Id.* 2061.

In charging the offense, it is unnecessary to follow strictly the language of the statute by which it is defined. *People v. Potter*, 35 Cal. 110.

In those cases in which it requires the concurrence of several acts, or the doing of the act under particular circumstances, to constitute an offense, the indictment or information should state the necessary acts and circumstances. *People v. Murphy*, 39 *id.* 52.

## ARTICLE X.

### MISCELLANEOUS.

**SECTION 61.** If any debtor shall die after the order of adjudication, the proceedings shall be continued and concluded in like manner and with like validity and effect as if he had lived.

This section is the same as 57 of the Act of 1880.

See section 385, C. C. P.

**SECTION 62.** Pending proceedings by or against any person, copartnership, or corporation, no statute of limitations of this state shall run against a claim which in its nature is provable against the estate of the debtor.

This section is the same as 58 of the Act of 1880.

**SECTION 63.** Any creditor, at any stage of the proceedings, may be represented by his attorney or duly authorized agent.

This section is the same as 59 of the Act of 1880.

**SECTION 64.** It shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart, for the use and benefit of said insolvent, such real and personal property as is by law exempt from execution; and also a homestead, in the manner as provided in section one thousand four hundred and sixty-five of the Code of Civil Procedure. But no property or homestead shall be set apart, as aforesaid, until it is first proved that notice of the hearing of the application therefor has been duly given by the clerk, by causing to be posted in at least three public places in the county at least ten days prior to the time of such hearing, setting forth the name of said insolvent debtor, and the time and place appointed for the hearing of such application, which said notice shall briefly indicate the homestead sought to be exempted or the property sought to be set aside; and the decree must show that such proof was made to the satisfaction of the court, and shall be conclusive evidence of that fact.

The clause requiring notice to be given before setting apart exempt property, was introduced into the Act of 1880 by amendment of February 27, 1893. This section is the same as 60, as thus amended, of the Act of 1880.

As to exemptions generally, see section 690, C. C. P. And as to homesteads, see sections 1236 to 1269, inclusive, C. C.

And as to setting apart homesteads in probate proceedings, see sections 1474 to 1486, inclusive, C. C. P.

#### *Exempt Property.*

In proceedings instituted by a partnership none of the partnership property can be set aside as exempt. Partnership property is not exempt, though it belongs to the class of property which would be exempt if owned by one person. *Cowan v. Creditors*, 77 Cal. 403.

The word "may" is construed as "shall," and it becomes the duty of the court to set aside a homestead for the insolvent upon a proper application and sufficient showing. The court has no discretion to refuse in such case. *Demartin v. Demartin*, 85 Cal. 71.

Where the opposition to a discharge is upon the ground that the insolvent had fraudulently procured property to be set aside to him as a teamster, it is not necessary for the court to find upon the question where the opposition also admits his having been a teamster. *In re Bowman*, 83 Cal. 153.

Where a lot of posts had been allowed to remain with the insolvent on his claim that they had been provided by him as firewood, it is no ground for reversing an order of discharge that he afterwards sold them for a small sum, with the knowledge of the assignee and without fraudulent concealment, and retained the money. *Id.*

A wagon sheet and six-horse lines may be properly claimed as exempt by an insolvent who is a teamster when it appears that such lines are useful with a two-horse team, and that the insolvent has no other wagon cover or lines. *Id.*

A jeweler's safe used by him in his business is exempt and should be set aside to him in insolvency proceedings. *In re McManus*, 87 Cal. 292.

The creditors have a right to appear and object to the setting aside of property as exempt from execution, without filing written exceptions. Where an implement of husbandry has been set aside to an insolvent farmer, he has no right to have another implement of the same kind, used for the same purpose also exempted unless it appear that the former implement is insufficient. *Estate of Baldwin*, 71 Cal. 74.

Upon the insolvency of one of the co-owners in a threshing outfit which is used some for threshing grain of the several owners, but is principally employed in threshing for other persons, the interest of the insolvent cannot be set aside as exempt. *Id.*

Property which is exempt does not pass by the statutory assignment to the assignee. *Mogk v. Peterson*, 75 Cal. 496.

The insolvent may maintain an action in his own name on a chose in action assigned to him as part of his exempt property. *Henley v. Lanier*, 15 B. R. 280. Insurance policy exempt.

#### *Homestead.*

The distinction of fraud between a debtor using funds of his own, in his hands, to relieve his homestead from incumbrance,



and the using partnership funds for such purpose is made in the cases of *Randall v. Buffington*, 10 Cal. 491; *Riddell v. Shirley*, 5 *id.* 488; *Shinn v. McPherson*, 58 *id.* 597; and cases there cited.

Insolvency proceedings and the setting aside therein of a homestead does not affect the lien of a mortgage already existing on the homestead property. *Bowman v. Norton*, 16 Cal. 214.

The pendency of insolvency proceedings is no objection to the insolvent's maintaining ejectment to recover the homestead premises. *Moore v. Morrow*, 28 Cal. 552.

Where the premises claimed by the insolvent to be a homestead consist of a lot with a double tenement house having separate entrances, and no intercommunication, the insolvent never having occupied but one of the tenements and the other always having been occupied by his tenants, it is error to set aside any except that portion actually occupied by the debtor and his own family. *Tiernan v. His Creditors*, 62 Cal. 286.

The assignee of the insolvent will be enjoined from selling property upon which the insolvent had properly declared a homestead, notwithstanding the insolvency court refused to set the same aside. *Dascey v. Harris*, 65 Cal. 361.

On authority of *Ham v. Santa Rosa Bank*, 62 Cal. 125, *Held*, the objection that the declaration of homestead stated the value to be \$8000, is of no avail against an order of the insolvency court setting aside the homestead. *Tiernan v. His Creditors*, 62 Cal. 286.

A declaration of homestead may embrace more land than is actually enclosed. The rule of construction "*Ut res valeat magis quam pereat*," applies to a declaration of homestead. *Ombaum v. His Creditors*, 61 Cal. 455.

Wheat growing on homestead premises and not yet ripened cannot be taken or sold by the assignee in insolvency. It is part of the homestead. *Dascey v. Harris*, 65 Cal. 357.

An order of the insolvency court directing the homestead of the debtor to be sold is without jurisdiction and the sale passes no title. *Barrett v. Simms*, 62 Cal. 440.

A homestead may be set apart to the insolvent out of property on which he had never resided. *Matter of Bowman*, 69 Cal. 244.

An order setting aside a homestead being a matter of public record in the insolvency proceedings, all persons are charged with notice thereof, and an action to charge the insolvent to whom a homestead has been set aside, with a constructive trust as to the land so set apart on the ground that it was not a valid homestead when set apart, and that the order was procured

through fraudulent representations that it was a homestead, will be barred by the statute after four years from the termination of the insolvency proceedings, and ignorance of the fraud will not prevent the running of the statute. *Hecht v. Slaney*, 72 Cal. 363.

It is not the intention of the Insolvent Act to embrace all the provisions of the probate law in relation to homesteads, and the reference in section 60 is only to the manner of setting aside a homestead. A mortgage executed by husband and wife on the homestead may be foreclosed after the insolvency of the husband without presenting it as a claim to the assignee in insolvency. *Montgomery v. Robinson*, 76 Cal. 229.

Prior to the amendment of 1893 (stats. p. 45) an order setting aside a homestead to the insolvent could be made *ex parte* and without any notice to the creditors. *Gaylord v. Place*, 98 Cal. 472.

A lathe for turning metal, used by a machinist in his trade and costing about \$250, is a tool, exempt from execution, and may be set aside as exempt property in insolvency proceedings. *In re Robb*, 99 Cal. 202.

For the purpose of the case it is admitted that the court may, on its own motion, set aside a homestead to the insolvent, out of suitable property, but a creditor cannot insist upon the court setting one aside.

Within one month prior to filing his petition in insolvency, the petitioner conveyed to a creditor the premises on which he resided as a home, but upon which no declaration of homestead had been filed. No application was made to nor any order by the court setting aside a homestead in the insolvency proceedings. In an action by the assignee to recover this property for the benefit of the estate of the insolvent, the lower court found all the facts which, under section 55 of the Act 1880, are required to render the transfer void, except it was not found that the transfer was made to prevent the ratable distribution of this property among the creditors, and this was not found because the property was such as the court could have set aside to the insolvent as a homestead, which course would have prevented its distribution among the creditors. *Held*, that under the findings the assignee was entitled to recover; the act of the insolvent in conveying the property in payment of a debt put it beyond his power to have it set aside as a homestead, and at the date of insolvency proceedings and subsequently, it was not property which could be so set aside by the court. *LaPoint v. Blanchard*, 101 Cal. 549.

An insolvent debtor is not entitled to have a homestead set apart to him of property which is primarily and chiefly used as a hotel for the accommodation of the public. *McDowell v. His Creditors*, 103 Cal. 264.

SECTION 65. The filing of a petition by or against a debtor upon which, or upon an amendment of which, an order of adjudication in insolvency may be made shall be deemed to be the commencement of proceedings in insolvency under this act.

The words "or upon an amendment of which" are new: otherwise this section corresponds with section 61 of the Act of 1880.

It was held that the filing of a petition to which a general demurrer should be sustained did not give the court jurisdiction, and could not, therefore, be regarded as the commencement of proceedings, and the filing of a sufficient amended petition did not avoid a transfer made by the insolvent more than thirty days prior to filing the amended petition, although such transfer was made within thirty days prior to filing the insufficient petition. *La Point v. Bulware*, 37 Pac. Rep. 929. (Cal.)

The purpose of this change in the law would seem to be to have the jurisdiction of the court relate back to the filing of an insufficient petition if it was subsequently so amended as to be sufficient, and support an adjudication. The purport is that proceedings shall be deemed commenced as of the time of filing an insufficient petition provided it is afterwards amended so as to make it sufficient. The well established rule is that a complaint which does not state facts sufficient to constitute a cause of action does not give jurisdiction, and will not support any judgment or order based thereon, but whether the date of an ineffectual attempt to confer jurisdiction may not be regarded as fixing a period within which acts of a party to the proceeding shall be deemed a violation of the statute upon which the proceeding is based, is a question to be determined. It would not do to contend that this provision constitutes that "a proceeding," which is at the same time a nullity under the general procedure of the state, and contrary to what may be termed a fundamental rule of jurisprudence.

The language of a statute will not be construed to effect an absurd or impractical result, nor a result which is in plain violation of fundamental principles of law or equity firmly established and universally recognized, unless such language absolutely requires such construction. *Jacobs v. Board of Supervisors*, 100 Cal. 121.

SECTION 66. Words used in this act in the singular, include the plural, and in the plural, the singular, and the word "debtor" includes partnerships and corporations.

This section is the same as 62 of the Act of 1880. Each of the codes of the state contains a similar provision. Pol. Code, Sec. 17; Civil Code, Sec. 14; Code of Procedure, Sec. 17; Penal Code, Sec. 7.

SECTION 67. Upon the filing of either a voluntary or involuntary petition in insolvency, a receiver may be appointed by the court in which the proceeding is pending, or by a judge thereof, at any time before the election of an assignee, when it appears by the verified petition of a creditor that the assets of the insolvent, or a considerable portion thereof, have been pledged, mortgaged, transferred, assigned, conveyed, or seized, on legal process, in contravention or violation of the provisions of section fifty-nine of this act, and that it is necessary to commence an action to recover the same. The appointment, oath, undertaking and powers of such receiver shall in all respects be regulated by the general laws of the state applicable to receivers. When an assignee is chosen, and has qualified, the receiver shall forthwith return to court an account of the assets and property which have come into his possession, and of his disbursements, and a report of all actions or proceedings commenced by him for the recovery of any property belonging to the estate, and the court shall thereupon summarily hear and settle the receiver's account, and shall allow him a just compensation for his services, including a reasonable attorney's fee, whereupon the receiver shall deliver all property, assets, or effects remaining in his hands, to the assignee, who shall be substituted for the receiver in all pending actions or proceedings.

Section 63 of the Act of 1880 was as follows:

"A receiver may be appointed by the court in which an insolvent proceeding is pending before the election of an assignee:

1. Upon the application of creditors where it is shown that the property, or any portion thereof, is in danger of being lost, removed, or materially injured;

2. In all other cases where receivers are appointed, by the usage of courts of equity. And thereupon the appointment, oath, undertaking, and powers of such receiver shall, in all respects, be regulated by the general laws of the state applicable to receivers."

That section was repealed in 1891, (Stats. 511) and section 6 of that act was at the same time amended so as to style the sheriff receiver where he was ordered to take possession of the insolvent's estate upon the filing of a voluntary petition.

See notes *ante* under section 10, where the question is suggested whether this section is exclusive, in the sense that the court could not appoint a receiver for sufficient reason, even though it did not appear necessary to bring an action to recover property of the insolvent.

The Code of Civil Procedure provides, sections 304 to 564, for the appointment, and prescribes the powers and duties, of receivers. Under those provisions it has been held that an order, before judgment, appointing a receiver was not an order from which a direct appeal would lie, nor subject to review on appeal from a final judgment; but that if it was an excess of jurisdiction, it was subject to review under section 1068 C. C. P. Also that the general and ordinary jurisdiction of courts of equity does not embrace the power to appoint a receiver in aid of an action by a private person against a corporation; but if such power existed it must be directly conferred by statute, and that section 564 C. C. P., did not confer it. *French Bank Case*, 53 Cal. 495.

The power was held improperly exercised in ejectment, and it was said that subdivision 6 of section 564 C. C. P., is but declaratory of the equity jurisdiction conferred upon the district courts by the former constitution. *Bateman v. Superior Court*, 54 *id.* 285.

A sale made to hinder, delay and defraud creditors is absolutely void, and the receiver appointed in insolvency proceedings is authorized to institute suit to recover the property. *Tapscott v. Lyon*, 103 Cal. 297.

It is the duty of the receiver appointed by the court to receive property when tendered to him by the insolvent as property belonging to the estate of the insolvent, and his refusal to accept would subject him to contempt. And having thus taken the property, he has no right to surrender it to another claimant without leave of court. *Id.*

Where the receiver is lawfully in possession of property claimed to belong to the estate of the insolvent debtor, he will be regarded as holding it as the servant of the court, and no one has a right to disturb his possession without leave of the insolvency court. *Id.*

A receiver, appointed in insolvency proceedings cannot be held as a tortfeasor in an action of trover to recover property from him, for any act done by him within the scope of his authority and under direction of the insolvency court. *Id.*

A receiver appointed by the court in insolvency proceedings, with directions to institute suit to recover property fraudulently transferred, is not entitled to seize and take possession of such property from a third person, no matter how manifest the fraud through which it was acquired. And if he takes the property from a person who is not a party to the insolvency proceedings, he does so at his own risk and will not be protected by the court

when not acting for the court. It is his duty to demand the property and upon refusal to bring suit to recover it. *Id.*

By means of a receiver the Superior Court may fully take possession of the insolvent's estate and preserve the same for the creditors, and the receiver may maintain an action to recover property belonging to the estate, including property which the insolvent had fraudulently conveyed, and may have the insolvent examined on oath concerning the property and his affairs. *Dennergy v. Superior Court*, 84 Cal. 7.

Where a receiver appointed in subsequent insolvency proceedings takes property turned over to an assignee for the benefit of creditors, the latter has his remedy against the former as a trespasser, but is not entitled to prohibition. *Haile v. Superior Court*, 78 Cal. 418.

The court may make an order for the examination of the insolvent at the instance of the assignee or receiver, or of a creditor, or on its own motion. *Goodyday v. Superior Court*, 65 Cal. 580.

And the receiver may apply for an examination of the insolvent. *Id.* and *Dennergy v. Superior Court*, 84 Cal. 7.

Where a receiver is appointed in involuntary proceedings and an appeal is taken from the order adjudging the debtor an insolvent, the functions of the receiver are not suspended pending the appeal. *Matter of Real Estate Associates*, 58 Cal. 356.

It was held in *Real Estate Associates v. Superior Court*, 60 Cal. 223, that a receiver could be appointed in insolvency proceedings, as well as in ordinary cases, by the judge at chambers, upon *ex parte* application.

And in a certain divorce suit such appointment was held improper where a mortgagee in possession had not committed waste. *Cummings v. Cummings*, 75 *id.* 434. And in a partition suit, *Baughman v. Reed*, *Id.* 320. As to rights in contest between a receiver appointed in insolvency proceedings and the assignee of the same insolvent debtor, under an assignment for benefit of creditors, see *Haile v. Superior Court*, 78 *id.* 418. A receiver in supplementary proceedings held properly appointed. *Habenecht v. Lissak*, *Id.* 351. And that property cannot be secured from attachment by being placed in the hands of a receiver even where the debtor is a foreign corporation. See *Humphreys v. Hopkins*, 81 *id.* 551. (The receiver was also one appointed by the court of another state.) And as to receivers where proceedings affect corporations, see *Havemeyer v. Superior Court*, *Id.* 827.

SECTION 68. All sections of the Code of Civil Procedure of the State of California relating to contempts are hereby made applicable to all proceedings under this act.

The above section is the same as the first clause of section 64 of the Act of 1880. The second clause of that section which read: "An appeal shall be allowed to the Supreme Court from any order adjudging any person guilty of a contempt of court," has been omitted. The statute is therefore placed entirely in harmony upon the matter of contempt, with the general procedure of the state. See C. C. P. Secs. 907, 910, 1209, 1222; also 178, 183, 1016, 1460, 1461.

That there is no appeal allowed in contempt proceedings, see *In re Vance*, 88 Cal. 262, approving *Tyler v. Connolly*, 65 id. 30, and *Sanchez v. Newman*, 70 id. 210. See also *In re Ohm*, 82 id. 160.

Where a sheriff holds property of the insolvent under attachments, he may be punished for contempt in not turning it over to the receiver. *Von Roun v. Superior Court*, 58 Cal. 358; *Ex parte Desmond*, 59 Cal. 399.

Proceedings for contempt are not appropriate for determining the issue of title to property claimed to belong to the insolvent's estate and also claimed by another person. Such issue should be tried in a proper action in which the verdict of a jury or findings by the court may be had. *Ex parte Hollis*, 59 Cal. 405.

A defendant imprisoned for non-payment of alimony and counsel fees having been released upon taking the insolvent oath prescribed in section 1148 C. C. P., will be discharged on *habeas corpus* from imprisonment upon a second order directing his imprisonment until he shall pay plaintiff "said alimony and counsel fees," the order apparently embracing alimony and fees which had accrued prior to his discharge on his oath. *Ex parte Batchelder*, 96 Cal. 233.

The insolvency court has no authority to adjudge a party guilty of contempt for not turning over to a receiver in insolvency money and effects which he claims adversely to the insolvent debtor. His rights to the property cannot be adjudged in a summary manner, though it be claimed that he acquired them in fraud of creditors. Such person, although president of an insolvent corporation and having verified the petition in insolvency, is not a party to the insolvency proceedings. *Ex parte Hollis*, 59 Cal. 405.

The assignee may be punished for contempt in not obeying an order of court to pay into court the share of money belonging to

a member of a partnership who is not a party to the insolvency proceedings. *Buhlert v. Superior Court*, 72 Cal. 97.

A husband who has been committed for contempt in not paying alimony ordered in divorce proceedings will not be discharged on *habeas corpus* by showing that he has, since his imprisonment, commenced insolvency proceedings. *Ex parte Wilson*, 73 Cal. 97.

If there be any conflict between the Insolvent Act and the Code of Civil Procedure, which professes to define the powers of courts and the effect of their judgments for contempt, the latter must prevail over the provisions of the former, and the provisions of the act must be confined to the purposes defined in its title. Concurring opinion of Justice Harrison in *ex parte Clancy*, 90 Cal. 557.

SECTION 69. When an attachment has been made and is not dissolved before the commencement of proceedings in insolvency, or is dissolved by an undertaking given by the defendant, if the claim upon which the attachment suit was commenced is proved against the estate of the debtor, the plaintiff may prove the legal costs and disbursements of the suit, and of the keeping of the property, and the amount thereof shall be a preferred debt. In all contested matters in insolvency the court may, in its discretion, award costs to either party, to be paid by the other, or to either or both parties, to be paid out of the estate, as justice and equity may require; in awarding costs the court may issue execution therefor. In all involuntary cases under this act, the court shall allow the petitioning creditors out of the estate of the debtor, if any adjudication of insolvency be made, as a preferred claim, all legal costs and disbursements incurred by them in that behalf.

This section is the same as 65 of the Act of 1880.

Costs incurred in an attachment which had been wrongfully issued cannot be allowed as a valid claim against the estate of an insolvent. *Appeal of Champlin*, 32 Pac. Rep. 567. (Cal.); *In re Harvey*, *Id.*

SECTION 70. The court may, upon the application of the debtor, if it be a voluntary petition, or of the petitioning creditors, if a creditor's petition, dismiss the petition and discontinue the proceedings at any time before the appointment of an assignee, upon giving ten days' notice to the creditors, in the same manner that notice of the time and place of election of an assignee is given, if no creditor files written objections to such dismissal, *provided, however*, that by consent of all creditors the proceedings may be dismissed at any time. After the appointment of an assignee, no dismissal shall be made without the consent of all parties interested in or affected thereby.

Section 66 of the Act of 1880, read as follows: "The court may, upon the application of the debtor, if it be a voluntary petition,



or of the petitioning creditors, if a creditor's petition, dismiss the petition and discontinue the proceedings at any time before the appointment of an assignee; after the appointment of assignee no dismissal shall be made without the consent of all parties interested in or affected thereby."

Under section 6 of the new act, the time appointed for the election of an assignee shall not be less than eight nor more than ten days from the date of adjudication, where the petition is voluntary, hence in a voluntary proceeding a notice to dismiss the proceeding must be given at least as early as the adjudication, even if the full ten days be given for the meeting of creditors, unless some proceeding is had for postponing the election of assignee. In involuntary proceedings of course, more time intervenes between the filing of the petition and the appointment of assignee.

SECTION 71. An appeal may be taken to the Supreme Court in the following cases:

1. From an order granting or refusing an adjudication of insolvency;
2. From an order made at the hearing of any account of an assignee, allowing or rejecting a creditor's claim, in whole or in part;
3. From an order granting or overruling a motion for a new trial;
4. From an order settling an account of an assignee;
5. From an order against or in favor of setting apart homestead or other property claimed as exempt from execution;
6. From an order granting or refusing a discharge to the debtor.

The notice, undertaking, and procedure on appeal shall conform to the general laws of this state regulating appeals in civil cases except that when an assignee has given an official undertaking and appeals from a judgment or order in insolvency, his official undertaking stands in the place of an undertaking on appeal, and the sureties therein are liable on such undertaking; *provided, however,* that an appeal from an order granting or refusing an adjudication of insolvency shall not stay proceedings unless a written undertaking be entered into on the part of the appellant, with at least two sureties, in such an amount as the court, or a judge thereof, may direct, but not less than double the value of the property involved, to the effect that if the order appealed from be affirmed, or the appeal dismissed, appellant will pay all costs and damages which the adverse party may sustain by reason of the appeal and the stay of proceedings.

Following is section 67 of the Act of 1880:

An appeal may be taken to the Supreme Court in the following cases:

1. From an order granting or refusing an adjudication of insolvency;
2. Allowing or rejecting a creditor's claim, in whole or in part;
3. Overruling a motion for a new trial;
4. Settling an account of an assignee;

5. Against or in favor of setting apart homestead or other property claimed as exempt from execution;

6. Granting or refusing a discharge to the debtor.

The notice, undertaking, and procedure on appeal shall conform to the general laws of this state regulating appeals in civil cases, except that when the assignee has given an official undertaking and appeal from a judgment or order in insolvency, his official undertaking stands in the place of an undertaking on appeal, and the sureties therein are liable on such undertaking.

Appeals in general—sections 936–959 C. C. P.

Notice of—section 940 *id.*; undertaking on—940, 941 *id.*

Official undertaking in lieu, compare section 965 C. C. P. And see constitutional provisions as to appeals, article VI, section 4.

Statutes are construed liberally in favor of appeal. Appeal of Houghton, 42 Cal. 45; San Francisco *v.* Real Estate, *Id.* 514.

Under the 336th section of the California Practice Act appeals were provided for in special proceedings, and a number of appeals from final judgments in insolvency proceedings were entertained by the Supreme Court prior to the amendments of 1863 to the constitution. Prior to said amendments the legislature had conferred jurisdiction in insolvency upon the county courts. The whole subject of insolvency being statutory, they were treated as “special proceedings.” Since the constitutional amendment by which such proceedings were recognized and jurisdiction expressly conferred upon the county courts, insolvency is no longer to be regarded as a “special proceeding” in the sense in which that phrase was applied to them prior to 1863. And while they are not “cases in equity” neither is the jurisdiction in error to be supported as dependent upon the “amount of the demand” or the value of the property in controversy. The subject matter is discharge from debts, and an “opposition” is interposed to defeat the object of the proceeding. *People v. Roseborough*, 29 Cal. 417. That appeal and not *certiorari* is the proper proceeding. *Sturgis v. Shepard*, 28 *id.* 115; *Kohlman v. Wright*, 6 *id.* 231; *Fisk v. His Creditors*, 12 *id.* 281.

An order denying the motion of a creditor to dismiss insolvency proceedings, after an adjudication has been made is non-appelleable. *Matter of Weirbitzky*, 96 Cal. 310.

The clause of section 64 authorizing an appeal from an order adjudging a person guilty of contempt, is in conflict with section 11, article I of the constitution which requires all laws of a general nature to have a uniform operation, and the insolvency provision must yield to the latter. *Ex parte Clancy*, 90 Cal. 553.

An appeal from an order adjudging an insolvent guilty of contempt in not turning over property to a receiver and committing him to custody of the sheriff, is in effect an appeal from an order directing the delivery of personal property, within the meaning of section 943 C. C. P., and an ordinary undertaking for \$300, conditioned for the payment of damages and costs, will not stay execution of the orders appealed from, nor authorize release from the imprisonment. *Id.*

There being an appeal from an order granting an adjudication in insolvency, a writ of error will not lie to review the action of the court granting an adjudication upon a voluntary petition while a petition in involuntary insolvency is pending. *Widber v. Superior Court*, 94 Cal. 430.

On appeal by the assignee his official bond operates as an undertaking on appeal, and has the effect to stay proceedings on the judgment or order appealed from as effectually as if a new undertaking were given for that purpose. *Matter of Sharp*, 92 Cal. 577.

The fact that an appeal is pending from an order setting aside a homestead to the insolvent, on the ground that the homestead is excessive is not one of the grounds upon which a discharge may be opposed. Such ground of objection to the discharge is demurrable. *Demartin v. Demartin*, 85 Cal. 76.

Appeal from an order of adjudication of insolvency is regulated by the general provisions of Code of Civil Procedure regulating appeals, and not being a case in which a separate stay bond is required, the ordinary appeal bond stays all further proceedings in the matter of the insolvency, so that the lower court cannot proceed to election of assignee nor require the insolvent to file schedules, etc. *Dennery v. Superior Court*, 84 Cal. 7.

Several creditors whose interests are alike affected may unite in an appeal from an order directing the mode of payment of their claims. *Matter of Cal. M. L. Ins. Co.*, 81 Cal. 364.

An order directing the insolvent to verify his inventory and schedule is not appealable. *In re Abbott*, 74 Cal. 381.

On appeal in insolvency proceedings the notice of appeal must be served on all the parties interested. *Matter of Castle Dome M. & S. Co.*, 79 Cal. 246.

The provisions of section 67 of the Act of 1880 do not apply to appeals other than in the cases there mentioned. Where judgment is obtained against an assignee to recover a partner's interest in partnership funds that came into his hands, his appeal

from such judgment will not stay execution unless accompanied by the usual stay bond. *Buhlert v. Superior Court*, 72 Cal. 97.

On appeal from a judgment given on the pleadings in an action in which attachment had issued, the judgment was sustained because the record did not show that the attachment had not been levied more than thirty days before the insolvency proceedings. The answer pleaded the stay of insolvency. The notice of motion for judgment stated that attachment papers would be used on the motion and the judgment recites that the attachment was issued more than thirty days prior to the insolvency. The record does not show what papers were in fact before the court on the motion and hence error is not pointed out by appellant. *Phillips v. Siering*, 63 Cal. 277.

An appeal taken subsequent to the appellant's adjudication in bankruptcy may be prosecuted in the name of the bankrupt or in the name of his assignee. *O'Niel v. Dougherty*, 46 Cal. 576.

A surety on an appeal bond is not released by the fact of the discharge in bankruptcy of his principal before the affirmance of the judgment on appeal. *Knapp v. Anderson*, 15 B. R. 316.

The judgment from which an appeal is taken is a "final" judgment, and it was not intended that proceedings in bankruptcy subsequent to appeal from such judgment should stay the proceedings on appeal. *Merritt v. Glidden*, 39 Cal. 559.

On appeal from an order settling the final account of an assignee in insolvency, a paper embodied in the transcript, certified by the trial judge as containing an abstract of the evidence given on hearing of settlement of the account of the assignee is not a part of the record, and will not be considered. *Estate of Farmer*, 70 Cal. 22.

And see notes under Sec. 70, *ante*.

SECTION 72. The Insolvent Act of eighteen hundred and eighty, and all amendments thereto, are hereby repealed; *provided, however*, that such repeal shall in no manner invalidate or affect any case in insolvency instituted and pending in any court on and prior to the day when this act shall take effect.

Section 68 of the Act of 1880, read as follows:

"All acts and parts of acts in conflict with the provisions of this act are hereby repealed; *provided, however*, that such repeal shall in no manner invalidate or affect any case in insolvency instituted and pending in any court prior to the day when this Act shall take effect."

The repeal of the Act of 1880 is without qualification; no part of that act remains in force after the taking effect of the pres-

ent one. *Hundley v. Chaney*, 65 Cal. 363; *Strueven v. His Creditors*, 62 *id.* 46.

The act was approved March 26, 1895, and as no other date was fixed for its taking effect, it goes into effect sixty days after its approval. Sec. 323 Pol. Code.



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## APPENDIX.

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# FORMS

FOR USE UNDER THE CALIFORNIA LAW FOR

## Assignments for Benefit of Creditors.

[Italics show where changes should be made to make the forms applicable to any particular case]

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### Form No. 1.

[3449 C. C.]

#### Assignment to Sheriff.

This indenture, made the *5th* day of *May*, A. D. one thousand eight hundred and ninety-five between *Nathaniel Barton* of the . . . County of *Los Angeles*, State of California, the assignor, and *William Burr*, Sheriff of the said . . . County of *Los Angeles*, State of California, assignee, Witnesseth, that the said *Nathaniel Barton*, being, as he is advised and fully believes, an insolvent debtor within the meaning and intent of Title III, Part II, Division IV, of the Civil Code of the State of California, concerning "Special Relations of Debtor and Creditor," and is unable to pay his debts from his own means as they become due, hereby, in pursuance with the provisions of said title, and for the uses and purposes and upon the trust therein provided for, grants, assigns, conveys and transfers to said *William Burr*, the Sheriff as aforesaid, all the estate, real, personal and mixed, particularly all choses in action and assignable rights of action, of or belonging to said assignor, or to which *he* is now entitled, in law or equity, and wheresoever situate, whether herein particularly or imperfectly described, or not described at all; and it is understood that the same will, if possible, be more particularly described in the inventory of said assignor hereaf.

ter to be filed. Excepting, however, and expressly reserving from the effect hereof, all the property, effects, estate and rights of the said assignor, which by any law of the State of California, or of the State where any of said property, estate or rights may be situate, which is or are exempt from execution.

Following is a description of the estate, real and personal, expressly intended hereby to be assigned, so far as the same can be now given or remembered by said assignor, (but if any exempt property be herein mistakenly described, it is not intended that the same shall pass by this assignment), to wit:

REAL ESTATE.

*S. E. qr. Sec. 1, T. 2 N., R. 6 W. San Bernardino Base and Meridian, subject to a mortgage to Mrs. Ida May in the sum of \$9000.00.*

PERSONAL PROPERTY.

*Seven head of horses.*

*Twenty-five cows.*

*Two milk wagons.*

*Promissory note of John Brown for \$100.00.*

*Account of Sam Roe, \$18.00.*

*Account of Tim Lowe, \$7.00.*

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, rents, issues and profits thereof.

To have and to hold all and singular the said real premises with the appurtenances, and the said personalty unto the said assignee and his lawful successor, in trust, however, to take, preserve, manage and dispose of the same for the benefit of all my just creditors in proportion to their respective demands, and in the manner and by the means set forth and provided in said Title III, Part II, Division IV, of the said Civil Code of the State of California. And subject only to the repayment by said assignee to the assignor of any overplus that remains in his hands, if any, after fully satisfying the purposes of said trust and all costs and expenses thereof.

Following is a list of the names of the creditors of said

assignor, and their places of residence and the amounts of their respective demands with the amounts and nature of any security given therefor respectively, so far as the same are now known to or remembered by said assignor.

NAME.	RESIDENCE.	AMOUNT.	AM'T AND NATURE OF SECURITY.
<i>Sam'l Barnum</i>	<i>San Francisco, Cal.</i>	<i>\$1000.00</i>	<i>Note and Mortgage.</i>
<i>John Jones,</i>	<i>Los Angeles, Cal.</i>	<i>3000.00</i>	<i>Account.</i>
<i>Alex. Bunch,</i>	<i>Pasadena, Cal.</i>	<i>3600.00</i>	<i>Promissory Note.</i>
<i>Mrs. Ida May,</i>	<i>Downey, Cal.</i>	<i>9000.00</i>	<i>Note and Mortgage.</i>
<i>Tim Moody,</i>	<i>Los Angeles, Cal.</i>	<i>20.00</i>	<i>Account.</i>
<i>Robert Platt,</i>	<i>Los Angeles, Cal.</i>	<i>125.00</i>	<i>Account.</i>

In witness whereof the said assignor has hereunto set *his* hand and seal the day and year first above written.

*Nathaniel Barton.* [SEAL.]

Signed, sealed and delivered in presence of }  
*L. E. Todd.*

[NOTE—Acknowledgment, same as other conveyances of real property, Sections 1181, 1189 Civil Code.]

## Form No. 2.

[3449 C. C.]

### Notice to be Mailed to Creditors.

Office of the Sheriff of . . . County of *Los Angeles*, California.  
*May 1st*, 1895.

*Mr. Barnum,*

DEAR SIR: In pursuance of section 3449 of the Civil Code of the State of California, and of the assignment by *Nathaniel Barton* of his estate for the benefit of creditors, executed to me of date *April 30*, 1895, you are hereby notified as one of the creditors of said *Nathaniel Barton*, named in *his* said assignment, to meet at my office in the city of *Los Angeles*, California, at 10 o'clock, A. M. of *Tuesday the 10th* day of *May*, A. D., 1895, for the purpose of electing an assignee, as the creditors may then determine, in my stead, for the purposes of the trust created by said assignment.

The amount of your demand as given in said assignment is *one thousand dollars*, and the same is stated to be secured by *mortgage*.

Should you find said statement of debt incorrect you may file with me, at or before said meeting, a statement under oath of your proper demand which will be received by me as correct so far as affects your right to vote for assignee at said meeting. If no such statement is filed by you, the amount of debt given in said assignment and herein given will be deemed correct for said purpose.

No creditor having a mortgage or pledge of real or personal property of the debtor, or lien thereon for securing the payment of a debt owing him from said debtor, will be allowed to vote any part of his claim at said meeting of creditors, unless he shall have first conveyed, released or delivered up his said security to me for the benefit of all the creditors of said assignor.

*William Burr,*  
Sheriff.

[If the security is pledgee of personal property, it should be so stated in in assignment, also the value of the security. The statute is: "The amount and nature of the security must be stated in the assignment."]

### Form No. 3.

[3449 C. C.]

#### Affidavit of Service by Mail.

Sheriff's Office. . . . County of *Los Angeles*, State of California.

In the Matter of	}
<i>Nathaniel Barton,</i>	
<i>Assignor for Benefit of Creditors,</i>	
An Insolvent Debtor.	

State of California,	}	ss.
County of <i>Los Angeles</i> .		

*William Burr*, being duly sworn, deposes and says that he is Sheriff of the . . . County of *Los Angeles*, State of California, that on the *4th* day of *May*, 1895, deponent served notice to the creditors of *Nathaniel Barton*, assignor, for the benefit of creditors, to meet at his office for the purpose of selecting an assignee of said *Barton's* estate, by depositing such notice, on said date in the post-office at *Los Angeles*, California, properly enclosed in

envelopes, addressed one to each of the creditors of said insolvent, who were named in the deed of assignment of said debtor, at their several places of residence as given in said deed of assignment, and prepaying the postage thereon; there being five of said notices so served. And following is a copy of said notice:

.....  
 .....  
 .....

*William Burr.*

Subscribed and sworn to before me)  
 this 4th day of May, A. D. 1895.

*T. E. Newlin*, Clerk.

By *A. W. Seaver*, Deputy.

---

**Form No. 4.**

[3449 C. O.]

**Notice to Creditors.**

[To be published by Sheriff.]

In the Matter of the Assignment for  
 the Benefit of Creditors of  
*Nathaniel Barton*,  
 An Insolvent Debtor. }

In pursuance with the provisions of section 3449 of the Civil Code of the State of California, and of the assignment to me by *Nathaniel Barton* a resident of *Pasadena*, in the County of *Los Angeles*, State of California, of date *May* the *4th*, 1895, of *his* estate for the benefit of *his* creditors, notice is hereby given to the creditors of said *Nathaniel Barton* that a meeting of said creditors will be held at my office, in the court house, in the City of *Los Angeles*, County of *Los Angeles*, State of California, at 10 o'clock A. M. of *Tuesday*, the *4th* day of *May* A. D., 1895, for the purpose of electing one or more assignees as said creditors may determine, in my stead, and for the purposes of the trust created by said assignment.

No creditor having a mortgage or pledge of real or personal property of the debtor, or lien thereon for securing the payment of a debt owing him from said debtor will be

allowed to vote any part of his claim at said meeting of creditors, unless he shall have first conveyed, released or delivered up his said security to me, for the benefit of all the creditors of said assignor.

*Los Angeles, May 4, 1895.*

*William Burr,*  
Sheriff.

### **Form No. 5.**

[3449 C. O. 415 C. O. P.]

#### **Affidavit of Publication of Notice to Creditors.**

In the Matter of  
*Nathaniel Barton,* }  
 Assignor for the Benefit of Creditors. }  
 State of California, }  
 County of *Los Angeles.* } ss.

*L. E. Moore*, of said City and County, being duly sworn, says that he is a citizen of the United States, over the age of eighteen years; not interested in the matter of *Nathaniel Barton*, assignor for the benefit of creditors and is not a party thereto.

That he is the principal clerk and bookkeeper in the office of the publisher of the *Times*, a newspaper published in said city and county, and as such clerk and bookkeeper has charge of all advertisements in said newspaper. That a notice, of which the annexed is a true copy, was published in said newspaper on the *4th* day of *May* 1895, and also on the *5th* day of *May* 1895.

*L. E. Moore.*

Subscribed and sworn to before me }  
 this *9th* day of *May*, 1895. }

*T. E. Newlin*, Clerk.

By *A. W. Seaver*, Deputy.

**Form No. 6.**

[3549 C. C.]

**Assignment by Sheriff to Assignee.**

This indenture, made the *4th* day of *May*, A. D. one thousand eight hundred and ninety-five, between *William Burr*, Sheriff of the . . . County of *Los Angeles*, State of California, the party of the first part and . . . and *Samuel Crozier* of the . . . County of *Los Angeles*, State of California, the party of the second part, Witnesseth, that, whereas on the *4th* day of *May*, A. D. 1895, *Nathaniel Barton* of the . . . County of *Los Angeles* State of California, by his certain indenture, on that day duly executed, did convey to me all his estate consisting of real and personal property, including choses in action and assignable rights of action wheresoever situate, and whether therein particularly or imperfectly described or not described at all, excepting and reserving therefrom all property and rights exempt by law from execution, which assignment was duly recorded on the *6th* day of *May*, 1895, at page 27 of book 31 of Deeds in the office of the County Recorder of said *Los Angeles* County, and whereas, the said first party hereto, Sheriff aforesaid, did thereafter on the *4th* day of *May*, 1895, duly notify by written notice, that day deposited in the United States mail, postage prepaid, and addressed to each of the creditors named in the said assignment, and addressed to said creditors respectively at their places of residence as given in said assignment, that a meeting of creditors would be held at his office in the City of *Los Angeles*, in *Los Angeles* County, State of California, at 11 o'clock A. M. of *Monday*, the *6th* day of *May*, 1895, for the purpose of electing an assignee of said debtor, in his stead for the purposes of the trust created by said assignment, and did also, on the *4th* day of *May*, 1895, caused to be published in the *Daily Herald*, a newspaper published at the City of *Los Angeles*, in said *Los Angeles* County, a similar notice of said meeting directed to all creditors of said insolvent debtor; and whereas at said time and place a meeting of creditors of said insolvent debtor was holden, at which said creditors present did select and designate the said *Samuel Crozier*, and . . . as assignee, in his stead and for the purposes of said trust. Now, therefore in pursuance of

the premises and of the provisions of section 3449 of the Civil Code of the State of California, the said first party hereby grants, conveys and assigns to said second party all of the estate, real and personal, choses in action and assignable rights of the said *Nathaniel Barton*, insolvent debtor as aforesaid, conveyed as aforesaid, to said first party, having first deducted the costs and expenses allowed by law for taking and keeping said property and giving said notices. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, with the reversion and reversions, remainder and remainders, rents, issues and profits thereof as fully, to all intents and purposes as the same were conveyed to said first party, and as fully as he can convey or has possessed the same. To have and to hold the same unto the said second party, for the uses and purposes of said assignment and for the benefit of the creditors of said insolvent debtor, and upon the trust in said assignment expressed.

In witness whereof,, the said party of the first part as sheriff and assignee as aforesaid, has hereunto set his hand and seal the day and year first above written.

*William Burr*, [SEAL.]

Sheriff.

[NOTE. Acknowledgment as required by Section 1181 and 1189 of the Civil Code.]

#### ORDER FIXING BOND.

[3467 O. C.]

[To be endorsed on the assignment of the Sheriff to the Assignee.]

It is hereby ordered that the within named assignee, *Samuel Crozier*, give bond as such assignee, to the State of California, in the sum of *ten thousand dollars* for the faithful performance of his duties as such assignee with sufficient sureties to be approved by a judge of the Superior Court in and for *Los Angeles County*, California.

Dated this *6th* day of *May*, 1895.

*Lucien Shaw*,  
Judge of Superior Court.



**Form No. 7.**

[3467 O. C.]

**Bond of Assignee.**

State of California, }  
 County of *Los Angeles*. }

In the matter of }  
*Nathaniel Barton*, }  
 Assignor for the Benefit of Creditors. }

Know all men by these presents that we, *Samuel Crozier*  
 as principal, .....

.....  
 and *Joseph Fox* and *Henry Harris* as sureties, are held and  
 firmly bound unto the State of California, in the sum  
 of *ten thousand* dollars, gold coin of the United States of  
 America, to be paid to said State of California, or assigns;  
 for the payment whereof, well and truly to be made we  
 bind ourselves, and each of us, our heirs, executors and ad-  
 ministrators, jointly and severally firmly by these presents.

Sealed and dated this *5th* day of *May* 1895.

The condition of the above obligation is such, that,  
 whereas, the above bounden *Samuel Crozier* was on the *5th*  
 day of *May*, 1895, at a meeting of the creditors of *Nathan-  
 iel Barton*, assignor for the benefit of *his* creditors, elected  
 the assignee of the estate of said *Nathaniel Barton* for the  
 purposes of the trust declared in *his* certain deed of assign-  
 ment executed to *William Burr*, sheriff of *Los Angeles*  
 County, California, of date the *5th* day of *May*, 1895.  
 Now if the said *Samuel Crozier* shall faithfully discharge  
 the trust of assignee aforesaid, and duly account for all  
 moneys received by him as such assignee, then this obliga-  
 tion to be void, otherwise to remain in full force and virtue.

Signed, sealed and delivered this *5th* day of *May*, 1895.

*Samuel Crozier*, [SEAL.]

*Joseph Fox*, [SEAL.]

*Henry Harris*, [SEAL.]

**Form No. 8.**

[3468 C. C.]

**Notice to be Given by the Assignee Within Ten Days After Filing His Bond.**

In the matter of  
*Nathaniel Barton,* } Notice to Creditors.  
 Assignor for the Benefit of Creditors.)

*Nathaniel Barton*, of *Los Angeles* County, California, having on the *5th* day of *May*, 1895, made an assignment of all his property to the Sheriff of *Los Angeles* County, California, for the benefit of his creditors, and the undersigned having been on the *8th* day of *July*, 1895, at a meeting of the creditors of said *Nathaniel Barton*, selected assignee of his said estate, and the said Sheriff having on the *8th* day of *July*, 1895, conveyed and assigned to him all of the said estate, and the undersigned having now given bond and entered upon the discharge of the trust created by said assignment, all persons having claims against said *Nathaniel Barton*, are hereby required to forthwith exhibit the same, with the necessary vouchers, duly verified by their respective oaths, to the undersigned assignee, at his place of business (or residence) at *Rooms 10, 11, 12 Bryson Building*, in the city of *Los Angeles*, California.

Following is a part of section 3468 of the Civil Code of the State of California, relating to secured claims:

"When a creditor has a mortgage or pledge of real or personal property of the debtor, or a lien thereon, for securing the payment of a debt owing to him from the debtor, and shall not have conveyed, released or delivered up such security to the sheriff, as provided for by section three thousand four hundred and forty-nine of this code, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such mortgage, pledge, or lien, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the Superior Court of the County in which the assignment is made shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the debtor's right of redemption therein on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon, and in

either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not sold or released, and delivered up, the creditor shall not be allowed to prove any part of his debt." [*In effect sixty days from March 26, 1895.*]

Dated *Los Angeles, Cal., July 8th, 1895.*

*Samuel Crozier, Assignee.*

[To be published once a week for four weeks, and a copy thereof to be mailed to each creditor named in the assignment at his place of residence as given in the assignment.]

[Affidavit of publication same as in form No. 5. Affidavit of mailing same as in form No. 4.]

## Form No. 9.

[346] O. O.]

## Inventory to be Filed by Assignor Within Twenty Days.

Name of Creditor.	Residence.	Sum Due.	Nature of Debt.	True Consideration.	Place where indebtedness arose.	Judgment or security.
Samuel Barnum.	San Francisco, Cal.	\$ 1000 00	Promissory note, or note and mortgage.	Money borrowed.	San Francisco.	Mort'ge on real estate situate in San Francisco, Cal.
John Jones.	Los Angeles, Cal.	3000 00	Account.	Food, wares and merchandise purchased.	Los Angeles City.	Jg't Superior Court, Los Angeles County.
Alex. Bundy.	Pasadena, Cal.	3600 00	Promissory note.	3 horses and 9 cows pur'd.	Pasadena, Cal.	None.
Mrs. Ida May.	Downey, Cal.	9000 00	Note and mortgage on S. E. $\frac{1}{4}$ Sec. 1, T. 8 N., R. 6 W. S. B. M.	Balance purchase money.	Downey, Cal.	Mortgage on same property.
Tim Moody.	Los Angeles City.	20 00	Account.	Blacksmithing.	Los Angeles City.	None.
Robert Platt.	" " "	125 00	Account.	Hay and feed purchased.	" " "	Jdg't justice's court.

INVENTORY—(Continued.)

PROPERTY EXEMPT FROM EXECUTION.

[690 O. O. P.]

**HOMESTEADS**—*Situate in the City of Los Angeles, County of Los Angeles, California, and particularly described as follows: Lot 22, Block X of Homestead Tract, as per map recorded in book 1, page 100, County Recorder's office, Los Angeles County, of the value of \$5000.00, on which there is a mortgage in favor of Samuel Barnum, in the sum of \$1000.00, bearing interest at 10 per cent. per annum, overdue, or due July 1, 1895.*

**PERSONAL PROPERTY**—*Household furniture, situate at the homestead above described; wearing apparel of debtor and family; insurance on the life of said Nathaniel Barton.*

**ALL OTHER PROPERTY**—

<i>S. E. qr. Sec. 1, T. 1 N., R. 6 W. S. B. M.</i>	<i>\$9000 00</i>
<i>25 head cows, \$25 each.</i>	<i>625 00</i>
<i>7 horses, \$45 each.</i>	<i>315 00</i>
<i>2 milk wagons, \$25 each.</i>	<i>50 00</i>

[NOTE.—The incumbrances existing, if any, may follow each encumbered item. The value of each item of property must also be stated.]

[3462 C. C.]

State of California, }  
 Los Angeles County. } ss.

*Nathaniel Barton* being duly sworn, on his oath says that the foregoing inventory has been carefully examined by him (or has been carefully read over and explained to him) and that he knows the contents of the same, and that the same is in all respects just and true to the best of his knowledge and belief.

*Nathaniel Barton.*

Subscribed and sworn to before me }  
 this 4th day of May, A. D. 1895. }

*T. E. Newlin, Clerk.*

By *A. W. Seaver, Deputy.*

**Form No. 10.**

[3462 C. C.]

**Petition for Examination of Assignor.**

In the Superior Court in and for *Los Angeles* County,  
State of California.

In the Matter of  
*Nathaniel Barton*,  
Assignor for the Benefit of Creditors. }

The petition of *Samuel Crozier* respectfully represents and shows to the Court.

That on the *6th* day of *May*, 1895, the above named *Nathaniel Barton*, being an insolvent debtor within the true intent and meaning of Title III, Part II, Division IV, of the Civil Code of the State of California, did then execute to *William Burr*, the Sheriff of the County of *Los Angeles*, State of California, his certain deed of assignment granting, assigning and conveying to said Sheriff all the estate of said *Nathaniel Barton*, for the benefit of *his* creditors in pursuance with the said provisions of said Civil Code, and that thereafter such notice, proceedings and meeting of creditors as are specified and required by section 3449 of said code, were duly given, made and had; that at a meeting of the creditors of said debtor held at the office of said Sheriff in the City of *Los Angeles*, State of California, this petitioner was duly elected assignee of the estate of said *Nathaniel Barton*. Whereupon said Sheriff duly granted and assigned to petitioner all the estate of said *Nathaniel Barton*, and your petitioner immediately qualified as such assignee by giving the bond required by section 3467 of said Civil Code, which bond has been duly approved by Hon. *Lucien Shaw*, a Judge of the Superior Court aforesaid, and thereupon the petitioner entered upon the duties of assignee, and is now the duly qualified and acting assignee of said estate.

That more than twenty days have elapsed since the execution of said deed of assignment by said *Nathaniel Barton*, and that no inventory has been filed by said *Nathaniel Barton*, and he refuses to prepare or file any such inventory, and your petitioner is unable from all the information he has, or has been able to obtain, to prepare any

proper inventory of said estate. Petitioner is informed and believes and therefore alleges that there are a large number of persons indebted to said *Nathaniel Barton* in various sums, by reason of the business of *dairying* conducted by said *Barton* before *his* said assignment, and that there is a large amount of property consisting of *young calves and heifers and several horses and colts* belonging to said *Barton* at the time of said assignment by him, and now rightfully belonging to *his* said estate, but now in the possession of persons unknown to petitioner (*or in possession of John Doe*) but the said *Barton* refuses to give petitioner any certain or satisfactory information concerning the same, (*or the said Barton conceals himself and his books from petitioner, and the said John Doe refuses to give petitioner any satisfactory or certain information concerning the amount or the identity or ownership of said property*) and that said *Barton* has refused to turn over to petitioner *his* books of account, or any book of account or other statement from which petitioner can ascertain the debtors of said *Barton*, or any list or inventory from which he can ascertain the items of *his* property or determine the ownership of said *cattle and horses*.

Wherefore petitioner prays that a citation issue out of this Court directed to said *Nathaniel Barton*, requiring *him* to be and appear before this Honorable Court, *or before Emanuel Minor, Esq., the Commissioner of this Court*, at a time and place to be designated by this Court and in said citation specified, to be examined touching the said matters and touching all matters which should be contained in an inventory of *his* estate as set forth and required in section 3461 of said Civil Code, and (*any other matter relative to the assignment, according to the cause for making the petition,*) and that said *Nathaniel Barton* be by said order and citation (*or by said order*) required to then and there have with *him* all books of account, vouchers and papers relating to the estate assigned as aforesaid by *him*, and that *he* be required to surrender to this petitioner as such assignee all of such books, vouchers, and papers to be retained until the trust under said assignment is fully completed and per-

formed, and for such other and further relief as may then appear meet and proper in the premises.

*Samuel Crozier,*  
Petitioner.

*Charles Choate,*  
Attorney for Petitioner.

### Form No. 11.

[3462 C. C.]

#### Order Requiring Assignor to Appear.

In the Superior Court, in and for *Los Angeles* County, California.

In the Matter of  
*Nathaniel Barton,* }  
Assignor for the Benefit of Creditors.)

Upon reading and filing the petition of *Samuel Crozier*, the assignee of the estate of said insolvent debtor and sufficient cause appearing therefrom, it is hereby ordered that the said *Nathaniel Barton* appear in this Court at the Court room of Department *five* thereof, in the Court house of said County in the City of *Los Angeles*, at *ten o'clock A. M.* of *Monday* the *20th* day of *June* A. D. 1895, then and there to be examined touching *his* estate and the matters required to be stated and shown in an inventory of *his* estate, and it is further ordered that *he* bring with *him* and then and there produce all *his* books of account, vouchers and papers relating to the property assigned by *him*, and that said books, voucher, and papers be thereupon delivered to the said assignee, to be retained by him until the trust under said assignment be fully completed and performed. That citation (or a copy of this order) issue and be served upon said *Nathaniel Barton* at least five days prior to said day of examination.

Done in open Court this *15th* day of *May*, A. D. 1895.

*Lucien Shaw,*

Judge.



**Form No. 12.**

[C. C. 3462. 1707 to 1711 C. C. P.]

**Citation.**

In the Superior Court in and for *Los Angeles* County, State of California.

Assignor for the Benefit of Creditors. }  
In the Matter of }  
*Nathaniel Barton,* }

The People of the State of California,  
To *Nathaniel Barton*:

By order of this Court you are hereby cited and required to appear before the Judge of this Court, (or before *Emanuel Minor, Court Commissioner at, etc.*) in the Court house in the County of *Los Angeles*, State of California, at the Court room of Department No. *five* on *Monday* the *20th* day of *June*, 1895, at 10 o'clock A. M. of that day, then and there to be examined touching your estate and the matters required to be stated and shown in an inventory of your estate, and you are further ordered and directed to bring with you, and then and there produce all your books of accounts, vouchers, and papers relating to the property assigned by you, and that said books, vouchers, and papers be thereupon delivered to *Samuel Crozier*, the selected assignee of your estate to be retained by him until the trust under said assignment be fully and completely performed.

Witness the Hon. *Lucien Shaw*, Judge of the Superior Court of the County of *Los Angeles* with the seal of said Court affixed, this *5th* day of *May*, 1895.

Attest:

*T. E. Newlin*, Clerk.

By *A. W. Seaver*, Deputy.

**Form No. 13.**

[Secs. 33 and 34, Insolvent Act of 1895, and 3469 C. C.]

**Petition of Creditor.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the matter of  
*Nathaniel Barton,* }  
 Assignor for Benefit of Creditors. }

To the Hon. Superior Court:

The petition of *John Jones* respectively shows that more than six months have elapsed since the date of the assignment in the above entitled matter by the said *Nathaniel Barton*, assignor for the benefit of creditors, and no account has been filed or rendered by *Samuel Crozier*, the assignee in said matter.

That your petitioner is one of the creditors of said *Nathaniel Barton* and is interested in said estate.

Wherefore, your petitioner prays for an order as provided for by section 3469 of the Civil Code of the State of California, requiring the said assignee to file with the clerk of this Court and present for settlement an account of his administration of said estate within such reasonable time as this court may designate, and for such other and further orders in the premises as to the court may seem meet.

*John Jones.*

**Form No. 14.**

[Secs. 33 and 34, Insolvent Act of 1895, and 3469 C. C.]

**Order for Assignee to Account.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*Nathaniel Barton,* }  
 Assignor for Benefit of Creditors. }

Upon filing and reading the petition of *John Jones*, in the above entitled matter, and sufficient cause appearing therefrom, it is hereby ordered that *Samuel Crozier*, the assignee of the said estate of *Nathaniel Barton*, file with the clerk of

this Court and present for settlement an account of his administration of the estate of said *Nathaniel Barton*, within *thirty* days after service upon him of a copy of this order; that a copy of this order be served upon *Samuel Crozier* forthwith.

Done in open court this *8th* day of *May*, 1895.

*Lucien Shaw.*

Judge.

[NOTE.—Proof of service same as in sections 415, 1709 and 1710, C. C. P.]

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### Form No. 15.

[Secs. 33 and 34 Insolvent Act of 1895 and 3469 C. C.]

### Notice to be Mailed to Creditors Prior to Rendering Account.

In the matter of  
*Nathaniel Barton*,  
Assignor for Benefit of Creditors. }

*Los Angeles, California, May 8th, 1895.*

*Mr. Moody:*

You will please take notice that the undersigned assignee in the above entitled matter will file with the Clerk of the Superior Court in and for *Los Angeles* County, California, *his (first)* account in said matter on the *8th* day of *May* 1895, (this date must not be less than ten nor more than fifteen days after the day of notice) and will thereupon ask said court to hear, audit and settle the same.

All persons interested in said estate may appear and file exceptions thereto and contest the same.

*Samuel Crozier,*

Assignee.

[NOTE. Affidavit of mailing of notice to be substantially the same as Form No. 3, and filed with the clerk.]

**Form No. 16.**

[Sec. 33, Insolvent Act of 1895, 2469 O. C.]

**Assignee's Account.**

## SCHEDULE A.

In the Superior Court in and for *Los Angeles County*,  
California.

In the Matter of  
*Nathaniel Barton*,  
Assignor for the Benefit of Creditors. }

*Samuel Crozier*

In account with the estate of  
189. *Nathaniel Barton*, Dr.

Received from Sheriff of <i>Los Angeles County</i> .		
CASH .....		
REAL ESTATE.		
<i>S. E. qr. Sec. 1, T. 2 N., R. 6 W. San Bernardino Base and Meridian.....</i>	<i>9000 00</i>	
PERSONAL PROPERTY.		
<i>7 head of horses, \$40 each.....</i>	<i>280 00</i>	
<i>25 cows, \$25 each.....</i>	<i>625 00</i>	
<i>2 milk wagons, \$25 each.....</i>	<i>50 00</i>	
BILLS RECEIVABLE AND ACCOUNTS.		
<i>Promissory note of John Brown, \$100.00 with interest accrued to date of assignment by Sheriff .....</i>	<i>15.00</i>	<i>115 00</i>
<i>Account of Sam Roe to .... 189.....</i>		<i>18 00</i>
<i>" " Tim Lowe to .....</i>		<i>7 00</i>
		<i>\$10,095 00</i>

[NOTE. There is no provision requiring value of property to be stated except in the inventory made by the assignor, (Section 3461, sub. 7,) but as an "inventory" properly includes a valuation, it would be proper to show the value of the property as stated in the inventory prepared by the assignee, if one is prepared by him, and if not, then the value stated in the inventory of the assignor, and the account can thus be made to show the loss or shrinkage, or increase suffered or realized by the assignee in the management of the estate.]

## SCHEDULE B.

SHOWING CLAIMS PRESENTED AGAINST THE ESTATE.

<i>John Jones</i> .....	\$ 3,000.00
<i>Alex Bundy</i> .....	3,600.00
<i>Mrs. Ida May</i> .....	9,000.00
<i>Tim Moody</i> .....	20.00
<i>Robert Platt</i> .....	125.00
	<hr/>
	\$15,745.00
<i>Value of estate as per inventory</i> .....	10,095.00
	<hr/>
	\$5,650.00

## SCHEDULE C

<i>Cash received from sale of 25 cows</i> .....	\$850.00
" " " " 7 horses .....	300.00
" " " " 2 wagons .....	100.00
" " " " 4 sets harness not in in- ventory .....	20.00
" " " " 75 gals. milk not in in- ventory .....	14.00
" collected from John Brown .....	119.60
" " " Sam Roe .....	18.00
" " " Tim Lowe .....	7.00
	<hr/>
	\$1428.60

*By direction of court settled claim of Mrs. Ida May by conveying to her the S. E.  $\frac{1}{4}$  of Sec. 1, T. 2 N., R. 6 W. S. B. M. in satisfaction of her mortgage debt.*

## SCHEDULE D.

	VOUCHER NO.	
<i>Paid William Burr, sheriff, for keeping}</i>		
<i>property under assignment to him.....}</i>	1	\$75.00
<i>Paid on dividend No. 1, to John Jones.....</i>	2	300.00
<i>" to Alex. Bundy.....</i>	3	360.00
<i>" to Tim Moody.....</i>	4	2.00
<i>" to Robert Platt.....</i>	5	12.00
<i>" to Daily Herald advertising Notice to}</i>		
<i>Creditors.....}</i>	6	5.00
<i>" to C. W. Palm Co. posters, notice of sale</i>	7	3.00
		<hr/>
		\$757.00

*Paid on dividend No. 2.*

*Samuel Crozier,*  
Assignee.

## AFFIDAVIT OF ASSIGNEE'S ACCOUNT.

In the Superior Court in and for *Los Angeles* County, State of California.

In the matter of  
*Nathaniel Barton,* }  
Assignor for Benefit of Creditors. }  
State of California, }  
County of *Los Angeles,* } ss.

*Samuel Crozier*, being duly sworn, says, I am the assignee *Nathaniel Barton*, assignor for the benefit of creditors, that the foregoing account prepared by me in all respects just and true, and according to the best of my knowledge, information and belief contains a full, true and particular account of all my receipts and disbursements on account of said estate from the date of the assignment to me to the 8th day of *May*, 1895, and of all sums of money belonging to said estate which have come into my hands as such assignee or been received by any other person by my order or authority for my use, and I do not know of any error or omission in the said account to the prejudice of any person interested in the aforesaid estate.

*Samuel Crozier,*  
Assignee.

Subscribed and sworn to before me }  
this 8th day of *May*, 1895. }

*T. E. Newlin*, Clerk,  
By *A. W. Seaver*, Deputy.

# FORMS FOR INSOLVENT ACT OF 1895.

## Form No. 18.

### Voluntary Petition by Debtor.

In the Superior Court in and for *Los Angeles* County, State of California.

In the matter of  
    *James Brown*,  
An Insolvent Debtor. }

To the Honorable, the Superior Court in and for *Los Angeles* County, State of California.

The petition of *James Brown* respectfully shows: That your petitioner is, and for more than six months last past *has been*, a resident of the *City of Los Angeles*, County of *Los Angeles*, in the State of California; that *he* is indebted in an amount exceeding three hundred dollars, and that *he* has become and is unable to pay *his* debts as they become due, and is unable at all to pay *his* debts in full, and is an insolvent debtor within the true intent and meaning of the act of the Legislature of the State of California, entitled, "An Act for the Relief of Insolvent Debtors, for the Protection of Creditors, and for the Punishment of Fraudulent Debtors," known and designated as the Insolvent Act of eighteen hundred and ninety-five; that *he* is desirous of having all *his* estate, property and effects, not exempt by law from execution, applied to the payment of *his* debts and liabilities, proportionally, and without preference to any, and for that purpose *he* is willing to and does surrender all of *his* estate, property and effects, for the benefit of *his* creditors, in pursuance of the provisions of said act; and your petitioner further declares that it is *his* desire to be discharged from all *his* debts and liabilities, and to that end *he* has annexed hereto an inventory of all of *his* said estate, property and effects, with a valuation thereof, and a schedule of all *his* debts and liabilities, as required by sections three (3) and four (4) of said Insolvent

ent Act of eighteen hundred and ninety-five, and according to the best of *his* ability, knowledge and belief, which schedules and inventory are all parts of this petition.

Wherefore, your petitioner prays to make a cession of *his* said estate, and to be discharged from all *his* debts and liabilities which may be proved against *his* estate in insolvency, whether the same have been fully set forth herein and in *his* said schedules, or are imperfectly set forth therein, or have been unintentionally omitted by *him* therefrom, in pursuance of the provisions of said act.

Dated *May 30, 1895.*

*Charles Choate,*  
Attorney for Petitioner.

*James Brown,*  
Petitioner.

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INVENTORY.

DESCRIPTION OF REAL ESTATE BELONGING TO PETITIONER.			
(Particular Description and Valuation.)			
OTHER INTERESTS IN REAL PROPERTY.			

*On which there is a mortgage to secure one promissory note in the sum of \$1000.00, bearing 8 per cent. interest per annum, dated Jan. 2, 1894, on which interest has been paid up to June 30, 1894, in favor of Samuel Johnston.*





## INVENTORY (Continued.)

EXEMPT PROPERTY, INCLUDING HOMESTEAD.		
HOMESTEAD. ( <i>Particular description and valuation.</i> )		
<i>Household and kitchen Furniture.</i>	<i>Situate at the residence of petitioner described herein as petitioner's homestead.</i>	
<i>Family Wearing Apparel.</i>		
<i>Law library of petitioner or sewing machine, or architect's implements and tools, or mechanics tools or team of a teamster, etc. See Sec. 690 C. O. P.</i>	<i>Situate at rooms 10-11. Pavilion Building in the City of Los Angeles.</i>	<i>Mortgaged to Thomas, ten per cent. for \$500.</i>

## OUTLINE OF FACTS TOUCHING RIGHTS OF ACTION.

*There is a cause of action existing in favor of petitioner against Nathaniel Barton, who carelessly and negligently drove his wagon into the buggy of petitioner on the first day of January, 1895, at the City of Los Angeles, upsetting petitioner's buggy and breaking one of the wheels, and tearing away the top thereof, to the damage of petitioner fifty dollars.*

[NOTE. The Insolvent Act does not say that a valuation should be given as to articles of exempt property, but there are certain articles only exempt to a certain value, as for instance chairs, tables, desks and books, Sub. 1, Sec. 690 C. O. P.; grain reserved for sowing, Sub. 3; the cabin of a miner and his tools and appliances, Sub. 5; poultry, Sub. 7, etc., and it would be advisable to enumerate all exempt articles with as much particularity as other classes of property, and see 72 Cal, 405.]

## SCHEDULE.

As required by Section 3 of the Insolvent Act of 1895, referred to in the annexed petition, and forming a part thereof; giving a full and true statement of petitioner's debts and liabilities.

Names of Creditors.	Residence of Creditors.	Sum Due.	Nature of Indebtedness.	True Cause and Consideration.	Time when same Accrued.	Place where same Accrued.	Nature of Security.	Amount of Security.
Don Juan,	Pasadena, Cal.,	\$1000 00	Note and Mortgage, Bk. "B" of Cactus	Purchase of lot 1, Tract	Jan. 1, 1894	Pasadena, Cal.,	Mortgage on same lot,	\$800 00
James Smart,	Los Angeles. Cal.	100 00	Account,	Purchase of horse,	Apr. 2, 1894	Los Angeles Cal.	None,	
Richard Simple,	Pomona, Cal.,	500 00	Note.	Purchase of land,	Aug. 3, 1894	Pomona, Cal.,	None,	
		\$1600 00						\$800 00

## OUTLINE OF FACTS TOUCHING RIGHTS OF ACTION AGAINST PETITIONER.

On 1st of January 1895 petitioner bought of Eureka Lemmon, 100 Navel Orange trees, 1 year from bud, to be paid for at 20 cents each, 30 days after delivery at his premises. Mr. Lemmon delivered trees of a different variety, which petitioner did not know of until after planting. He then refused to pay and offered to return the trees, which Lemmon refused to accept, and has threatened suit.

State of California, }  
 . . . . County of *Los Angeles*, } ss.

I, *James Brown*, do solemnly swear that the petition, schedule and inventory now delivered by *me* contain a full, perfect, and true discovery of all the estate, real, personal, and mixed, goods and effects, to *me* in any way belonging; all such debts as are to *me* owing, or to any person or persons in trust for *me*, and all securities and contracts, and contracts whereby any money may hereafter become payable, or any benefit or advantage accrue to *me* or to my use, or to any other person or persons in trust for *me*; that the schedule and inventory, respectively, contain a clear outline of the facts touching any known right of action against *me* by any one, and an outline of the facts touching all rights of action in *my* favor against any one; that *I* have no lands, money, stock, or estate, reversion, or expectancy, besides that set forth in *my* schedule and inventory; that *I* have in no instance created or acknowledged a debt for a greater sum than *I* honestly and truly owe; that *I* have not, directly or indirectly, sold, or otherwise disposed of, or concealed, any part of *my* property, effects, or contracts; that *I* have not in any way compounded with *my* creditors whereby to secure the same, or to receive or to expect any profit or advantage therefrom, or to defraud or deceive any creditor to whom *I* am indebted in any manner. So help *me* God.

*James Brown.*

Subscribed and sworn to before me }  
 this 9th day of *May*, 1895. }

*T. E. Newlin*, Clerk.

By *A. W. Seaver*, Deputy.

### Form No. 19.

#### Adjudication of Insolvency.

In the Superior Court in and for *Los Angeles* County, State of California.

In the matter of )  
*James Brown* )  
 An Insolvent Debtor.)

*James Brown*, having filed in this Court his petition,

schedule, and inventory in insolvency, by which it appears that he is an insolvent debtor, the said *James Brown* is hereby declared to be an insolvent debtor. The Sheriff of the County of *Los Angeles* is hereby directed to take possession of all the estate, real and personal of the said *James Brown*, debtor, except such as may be by law exempt from execution, and of all his deeds, vouchers, books of account, and papers, and to keep the same safely until the appointment of an assignee of his estate. All persons are forbidden to pay any debts to said insolvent, or to deliver any property belonging to him, or to any person, firm, or corporation, or association for his use. The said debtor is hereby forbidden to transfer or deliver any property, until the further order of this Court, except as herein ordered.

It is further ordered, that all the creditors of said debtor be and appear before the Hon. *Lucien Shaw*, Judge of the Superior Court, in and for the County of *Los Angeles*, State of California in open Court, at the Court room of *Department five* of said Court, in the city of *Los Angeles* on the *29th* day of *May*, 1895, at *ten o'clock A. M.*, of that day, to prove their debts and choose an assignee of the estate of said debtor.

It is further ordered, that this order be published in the *Daily Times*, a newspaper of general circulation published in the County of *Los Angeles*, as often as the said paper is published before the said day set for the meeting of creditors.

And it is further ordered, that, in the mean time, all proceedings against the said insolvent be stayed.

*Lucien Shaw,*

Judge of the Superior Court.

Dated, *May 30*, 1895.

State of California, }  
 . . . . County of *Los Angeles*, } ss.

I, *James Brown*, do solemnly swear that the petition, schedule and inventory now delivered by *me* contain a full, perfect, and true discovery of all the estate, real, personal, and mixed, goods and effects, to *me* in any way belonging; all such debts as are to *me* owing, or to any person or persons in trust for *me*, and all securities and contracts, and contracts whereby any money may hereafter become payable, or any benefit or advantage accrue to *me* or to my use, or to any other person or persons in trust for *me*; that the schedule and inventory, respectively, contain a clear outline of the facts touching any known right of action against *me* by any one, and an outline of the facts touching all rights of action in *my* favor against any one; that *I* have no lands, money, stock, or estate, reversion, or expectancy, besides that set forth in *my* schedule and inventory; that *I* have in no instance created or acknowledged a debt for a greater sum than *I* honestly and truly owe; that *I* have not, directly or indirectly, sold, or otherwise disposed of, or concealed, any part of *my* property, effects, or contracts; that *I* have not in any way compounded with *my* creditors whereby to secure the same, or to receive or to expect any profit or advantage therefrom, or to defraud or deceive any creditor to whom *I* am indebted in any manner. So help *me* God.

*James Brown.*

Subscribed and sworn to before me }  
 this 9th day of *May*, 1895. }

*T. E. Newlin*, Clerk.

By *A. W. Seaver*, Deputy.

### Form No. 19.

#### Adjudication of Insolvency.

In the Superior Court in and for *Los Angeles* County, State of California.

In the matter of }  
*James Brown* }  
 An Insolvent Debtor. }

*James Brown*, having filed in this Court his petition,

schedule, and inventory in insolvency, by which it appears that he is an insolvent debtor, the said *James Brown* is hereby declared to be an insolvent debtor. The Sheriff of the County of *Los Angeles* is hereby directed to take possession of all the estate, real and personal of the said *James Brown*, debtor, except such as may be by law exempt from execution, and of all his deeds, vouchers, books of account, and papers, and to keep the same safely until the appointment of an assignee of his estate. All persons are forbidden to pay any debts to said insolvent, or to deliver any property belonging to him, or to any person, firm, or corporation, or association for his use. The said debtor is hereby forbidden to transfer or deliver any property, until the further order of this Court, except as herein ordered.

It is further ordered, that all the creditors of said debtor be and appear before the Hon. *Lucien Shaw*, Judge of the Superior Court, in and for the County of *Los Angeles*, State of California in open Court, at the Court room of *Department five* of said Court, in the city of *Los Angeles* on the *29th* day of *May*, 1895, at *ten o'clock A. M.*, of that day, to prove their debts and choose an assignee of the estate of said debtor.

It is further ordered, that this order be published in the *Daily Times*, a newspaper of general circulation published in the County of *Los Angeles*, as often as the said paper is published before the said day set for the meeting of creditors.

And it is further ordered, that, in the mean time, all proceedings against the said insolvent be stayed.

*Lucien Shaw*,  
Judge of the Superior Court.

Dated, *May 30*, 1895.

**Form No. 20.****Clerk's Affidavit of Mailing.**

In the Superior Court in and for *Los Angeles* County, State  
of California.

In the Matter of *James Brown* }  
an Insolvent Debtor. }

State of California, }  
County of *Los Angeles* } ss.

*A. W. Seaver*, being duly sworn, says: that he is  
*Deputy County Clerk* of the County of *Los Angeles*; that on  
the first day of *June*, 1895, he served the Adjudication of  
Insolvency, Stay of Proceedings, and Order of Publication of  
Notice to Creditors, and Notice to Creditors, in the matter  
of *James Brown*, an insolvent debtor, upon each of the fol-  
lowing named creditors of said debtor, being all the credit-  
ors mentioned in the schedule of said insolvent filed herein,  
viz: *Jack McIntosh*, *Daniel McCarty*, *Samuel Simpson*, by  
depositing a copy of said Adjudication of Insolvency, Stay  
of Proceedings, Order of Publication, and Notice to Credit-  
ors, in the United States post-office, at the city of *Los Angeles*,  
inclosed in an envelope, postage prepaid, and addressed one  
to each of said creditors, at his place of business, [or resid-  
ence] as stated in said schedule. Annexed is a copy of  
said order and notice so mailed.

*A. W. Seaver*,  
*Deputy County Clerk.*

Subscribed and sworn to before me }  
this ninth day of *June*, 1895. }

*T. E. Newlin*, County Clerk.

**Form No. 21.****Affidavit of Publication.**

In the Superior Court in and for *Los Angeles* County, State  
of California.

In the Matter of *James Brown* }  
an Insolvent Debtor. }

State of California, }  
County of *Los Angeles*. } ss.

*Carl Sacks*, being duly sworn, says: That he is a citizen  
of the State of California, over the age of eighteen years,



not interested in the matter of *James Brown*, an insolvent debtor. That he is principal clerk [or printer] of the *Daily Times*, a newspaper of general circulation, printed and published in said *Los Angeles* County, and as such he has charge of all advertisements in said newspaper;

That the annexed notice of the time and place of holding the meeting of creditors of said debtor, his Adjudication in Insolvency, and Stay of Proceedings as ordered by the Superior Court in and for the County of *Los Angeles*, in the matter of said insolvency, was published in said newspaper on the following days, to wit: On the *first, second, third, fourth, fifth, sixth, seventh and eighth* days of *June* respectively, 1895.

*Carl Sacks.*

Subscribed and sworn to before me }  
this *sixth* day of *June*, 1895. }

*D. C. Dick*, Notary Public.

### **Clerk's Receipt for Books, Etc.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of *James Brown*, }  
an Insolvent Debtor. }

Received this day, of *James Brown*, an Insolvent Debtor, the following described books: *One day book, one cash book, and one ledger.*

*T. E. Newlin*, Clerk,

By *A. W. Seaver*,

Deputy Clerk.

Dated *June 1st*, 1895.

### **Form No. 22.**

#### **Order of Court Appointing Assignee.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of }  
*James Brown*, }  
An Insolvent Debtor. }

Whereas, *James Brown* did on the *first* day of *June*, 1895, petition this Court to be discharged from all his debts in

pursuance of the provisions of an act of the Legislature of the State of California, entitled "An Act for the Relief of Insolvent Debtors, for the Protection of Creditors and for the Punishment of Fraudulent Debtors," known as the "Insolvent Act of eighteen hundred and ninety-five," and the Court thereupon, to wit, on the 5th day of June, 1895, made an order requiring the creditors of said insolvent to be and appear on the 10th day of June, 1895, before the said Court, at the Court-room of Department five of said County Courthouse, in said County, to choose an assignee of said estate, in pursuance whereof the said Clerk did mail to all the creditors of said insolvent, and did cause to be published, a copy of said order calling them to appear in the said Court, on the said 10th day of June, 1895, on which day, it having been proven to the satisfaction of the Court that the said notice to the creditors of said insolvent had been duly mailed and published in pursuance of said order, and no creditors of said insolvent appearing,

Now, therefore, it is ordered, that *Samuel Pratt* be and he is hereby appointed assignee of the estate of said debtor, upon his filing a bond as provided by law in the sum of one thousand dollars.

Done in open Court this 10th day of June, 1895.

*Lucien Shaw,*

Judge of the Superior Court.

### **Form No. 23.**

#### **Assignment by Clerk to Assignee.**

In the Superior Court, in and for *Los Angeles* County, State of California.

In the Matter of }  
*James Brown,* }  
 An Insolvent Debtor. }

This indenture made this *fifteenth* day of *June*, 1895, between *T. E. Newlin*, clerk of the Superior Court in and for *Los Angeles* County, State of California, party of the first part and *Samuel Pratt*, assignee of the estate of *James Brown* an insolvent debtor, party of the second part, Witnesseth, that whereas, the said *James Brown*, on the *first* day of *June*, 1895, presented to the Honorable the Superior Court, in and

for the County of *Los Angeles*, his petition in pursuance of the provisions of an Act of the Legislature of the State of California, entitled "An Act for the Relief of Insolvent Debtors, for the Protection of Creditors, and for the Punishment of Fraudulent Debtors," and known as the "Insolvent Act of eighteen hundred and ninety-five," praying to be discharged from all his debts, and such proceedings having been thereupon had in due form of law, that on the *tenth day of June, 1895*, the creditors, although duly summoned, not having attended on the day appointed for their meeting, and refusing to appoint an assignee, the said Court did, by order then, duly made appoint [or, the creditors of said insolvent did select] *Samuel Pratt* assignee of the estate of said insolvent debtor, and to perform, in every respect the functions of an assignee; and for the faithful performance of said trust, the said assignee having filed a bond as ordered by the Court, and which bond has been duly approved.

Now, therefore, in consideration of the premises, and of the benefit of said act, and in pursuance of and in obedience to the above recited order, and the said act, the said party hereto, of the first part, hath granted, assigned, conveyed, transferred and set over, unto the said party of the second part, his successors or assigns, all, and all manner of goods, chattels, debts, moneys, deeds, books and papers and all other things, property, estate and effects of the said insolvent debtor, real, personal and mixed, of what kind, nature or quality soever, and wheresoever the same may be situate, and whether in possession, reversion, remainder, or in action, at the time of the commencement of the said proceedings in insolvency, except such property as is exempt by law from execution.

To have and to hold the same and every part and parcel thereof unto the said party of the second part, his successors and assigns, forever, to and for the uses and purposes in the said act declared.

In witness whereof, the said party of the first part hath hereunto set his hand and the seal of said Superior Court, the day and year first above written.

[SEAL.]

*T. E. Newlin*, Clerk.

**Form No. 24.****Clerk's Affidavit of Service, etc.**

In the Superior Court in and for *Los Angeles* County, State of California.

State of California,        )  
 ....County of *Los Angeles*, } ss.

*C. D. Fitzgerald*, being duly sworn, says: That he is *Deputy* County Clerk of said County, and was, at the time of making the service hereinafter mentioned and described, a male citizen of the United States of America, over eighteen years of age, and competent to be a witness in the within-entitled matter, and has no interest therein; that he personally served the annexed Adjudication of Insolvency, Stay of Proceedings, and Order of Publication, on the *third* day of *May*, 1895, upon the within-named *Creditors*, *A. B. and Co.*, *L. M. Longley* and *C. D. Hand*, by delivering to each of said persons personally, in said County, a full, true, and correct copy of said Adjudication of Insolvency, Stay of Proceedings, and Order of Publication.

*C. D. Fitzgerald*, *Deputy* County Clerk.

Subscribed and sworn to before me }  
   this 9th day of *May*, 1895. }  
 [L. s.]     *T. E. Nougues*, County Clerk. }

**Form No. 25.****Exceptions to Claim.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of        )  
                   *James Brown*        ) No.  
 An Insolvent Debtor. }

Now comes *Richard Simple*, who is a creditor of the estate of *James Brown*, the insolvent debtor named in the above entitled matter, and excepts to the legality [or good faith] of the claim presented against said insolvent's estate by *James Smart*. The interest the said *Richard Simple* has in said insolvent's estate is as follows, to wit: The said insolvent is indebted to him in the sum of \$500.00 on a promissory note dated 3d day of August 1894, bearing interest at

the rate of 10 per cent. per annum from date, and due on the first day of December, 1894; which said note is in no way secured. The grounds of his objection to the claim of said James Smart are following, to wit: That the same is barred by Subdivision 1 of Section 339 of the Code of Civil Procedure. Wherefore he prays that the said James Smart be not allowed to vote in said claim in the election of an assignee of said insolvent's estate.

*Ivan Band,*

Attorney for *Richard Simple*.

State of California, }  
County of *Los Angeles*. } ss.

*Richard Simple* being duly sworn deposes and says that he has read [or heard read] the foregoing exceptions to the claim of *James Smart*, in the above entitled matter, that he knows the contents thereof and that the same is true of his own knowledge except as to matters therein stated on information or belief and as to said matters he believes it to be true; and that said exceptions are not made for the purpose of delay, or otherwise than in good faith in the best interest of the estate of said insolvent.

*Richard Simple.*

Subscribed and sworn to before me }  
this 8th day of *May*, 1895. }

*T. E. Newlin, County Clerk.*

*By A. W. Seaver, Deputy Clerk.*

### Form No. 26.

#### Order of Court on Exceptions.

In the Superior Court in and for *Los Angeles* County, State of California.

In the matter of }  
*James Brown,* } No.  
An Insolvent Debtor. }

The exceptions filed by *Richard Simple* to the claim of *James Smart* presented against the estate of the said *James Brown* in the above entitled matter, having come up regularly for hearing before me on this 9th day of *June*, 1895,

after hearing the proofs therein submitted, and it appearing therefrom to the satisfaction of the court that the claim of said *James Smart* for \$100.00 is barred by the provisions of *Subdivision 1, section 339* of the Code of Civil Procedure, it is therefore ordered that said *James Smart* be and he is hereby prohibited from voting his said claim in the election of an assignee of said insolvent's estate.

Done in open court this 9th day of June, 1895.

*Jas. A. Dougherty,*  
Judge of Superior Court.

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**Form No. 27.**

**Petition to Fix Value of Security.**

In the Superior Court, in and for *Los Angeles* County, State of California.

In the Matter of	}	No.
<i>James Brown</i>		
An Insolvent Debtor.		

The petition of *Dan Swan* respectfully shows that he is a creditor of the estate of *James Brown*, the insolvent debtor, in the above entitled matter; that his claim consists of a promissory note for the sum of \$1000.00, dated September 1st, 1894, and due one year after date, with interest thereon from date at 12 per cent. per annum, payable annually—none of the interest having ever been paid; that said note is secured by a mortgage on lot 1, block "B" of the Cactus tract in the city of Pasadena, County of Los Angeles, California; that the value of said security is not sufficient to pay said debt in full, and in truth is no more than \$800.00, which would leave a balance of \$200.00 of the principal, besides interest, as unsecured. And petitioner being desirous of being admitted as a creditor of said estate and of voting the unsecured portion of his said claim in the election of an assignee of said insolvent's estate, prays an order fixing the sum upon which he may be admitted and which he may vote at the election of said assignee.

*Iron Band,*  
Attorney for Petitioner.

NOTE:—Evidence of the value of the security should be produced to the court by verification of petition, affidavit, etc.

**Form No. 28.****Order Fixing the Value of Security.**

In the Superior Court, in and for *Los Angeles* County, State of California.

In the Matter of	}	No.
<i>James Brown,</i>		
An Insolvent Debtor.		

*Dan Swan*, a creditor of *James Brown*, the insolvent named in the above entitled matter having presented his petition asking that the amount of security of his said debt be fixed by the court and that he be admitted as a creditor of the estate of said insolvent, and satisfactory proofs having been produced to me that said security does not exceed in value the sum of \$800.00. It is therefore ordered that the value of the security held by said *Dan Swan* be fixed at \$800.00, and that it is fair and reasonable that he be admitted as a creditor of the estate of said insolvent for the balance of his said claim in excess of said \$800.00, and be entitled to vote said balance in the election of an assignee of said insolvent's estate.

*W. P. Harlow,*  
Judge Superior Court.

**Form No. 29.**

[Sec. 48, Insolvent Act.]

**Assignment of Claim to Sheriff (or Assignee).**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of	}	No.
<i>James Brown</i>		
An Insolvent Debtor.		

In consideration of being admitted as a creditor of the estate of *James Brown*, the insolvent named in the above entitled matter, I hereby assign, set over and convey to *William Burr*, the sheriff of said county of *Los Angeles*, for the use and benefit of the estate of said insolvent, and upon the trust provided by the Insolvent Act of 1895. [Insert description of debt and security substantially as in form No. 27.]

In witness whereof I have hereunto set my hand and seal,  
this 6th day of *September*, 1895.

*Dan Swan*, [SEAL.]

NOTE.—If the security conveyed is real estate the assignment should be acknowledged as required of deeds.

### Form No. 30.

#### Minute by Clerk in Electing Assignee.

[First meeting of Creditors.]

In the Superior Court in and for *Los Angeles* County, State  
of California.

In the Matter of  
*James Brown*  
An Insolvent Debtor. )

In open Court, *September 29*, 1895.

This being the day appointed by the Court for the meeting of creditors in the above matter, and of which due notice has been given to creditors by publication in the *Daily Herald* and personally, [or through the mail] those whose names are hereunder written, being the majority in amount of claims against said debtor aforesaid, and who have proven their debts, have chosen, and do hereby nominate and choose *Peter Verne* to be the assignee of the said debtor's estate and effects, and ask that he may be appointed such assignee accordingly:

Names of Creditors above mentioned.	Residence of the same.	Amount of Debt.
<i>Dan Swan</i> .....	<i>City of Los Angeles</i> .....	\$ 380 00
<i>Richard Simple</i> .....	" " " "	500 00

*T. E. Newlin*, County Clerk.  
By *Henry Simpson*, Deputy.



**Form No. 31.****Order Fixing Bond of Assignee.**

In the Superior Court in and for *Los Angeles* County,  
State of California.

In the Matter of  
*James Brown* }  
An Insolvent Debtor. }

*Peter Verne* having this day been elected the assignee of the estate of *James Brown* said insolvent debtor, by the creditors of said debtor, the said *Peter Verne* is hereby appointed such assignee, and his bond as such is fixed at the sum of \$3,000.

Done in open Court this *29th* day of *September*, 1895.

*S. N. Smith*,  
Judge Superior Court.

**Form No. 32.****Notice to Assignee of Appointment.**

In the Superior Court in and for *Los Angeles* County,  
State of California.

In the Matter of  
*James Brown* }  
An Insolvent Debtor. }  
*To Peter Verne, Esq.*

You are hereby notified, that a meeting of the creditors of *James Brown*, an insolvent debtor, held in open Court in the Superior Court of the County of *Los Angeles*, on *29th* day of *September*, 1895, you were elected assignee of the said insolvent debtor; and, by order of the Court, you are hereby directed to file a bond to the State of California with the Clerk of this Court, in the sum of *three thousand dollars*, as fixed by this Court, with two or more sufficient sureties, to be approved by the Court, conditioned for the faithful performance of the duties devolving upon you as such assignee.

The said bond shall be filed within *five* days from the date hereof.

Dated *September 29*, 1895.

*T. E. Newlin*, County Clerk.

**Form No. 33.****Bond of Assignee, (Voluntary.)**

In the Superior Court in and for *Los Angeles* County, State of California.

In the matter of }  
*James Brown* } No.  
 An Insolvent Debtor. }

Know all men by these presents, that we, *Peter Verne* as principal and *Samuel Ford* and *Henry Hanks* as sureties all of said County and State, are held and bound unto the State of California in the sum of *three thousand* dollars, to be paid to said State of California or assigns; for the payment of which we jointly and severally bind ourselves, our heirs, executors and administrators. Signed and sealed this *30th* day of *September*, 1895.

The condition of the above bond is such that, whereas on the *29th* day of *September*, 1895, in the Superior Court of said County of *Los Angeles*, the said *Peter Verne* principal herein, was duly elected by the creditors of said insolvent, [or appointed by the court] assignee of the estate of said *James Brown*, an insolvent debtor. Now, if said *Peter Verne*, assignee aforesaid, shall faithfully perform the duties devolving upon him as such assignee, then this bond shall be void; otherwise of full force.

*Peter Verne*, [SEAL]

*Samuel Ford*, [SEAL]

*Henry Hanks*. [SEAL]

Signed, sealed and delivered in the presence of, }  
*Joseph McCarthy*. }

[Approval of Court to be endorsed on the bond.]

The within bond of *Peter Verne* as assignee of the estate of *James Brown* an insolvent debtor, is approved.

Dated this *21st* day of *September*, 1895.

*H. N. Clement*,

Judge Superior Court.

**Form No. 34.****Assignment by Clerk to Assignee.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*James Brown*,  
An Insolvent Debtor. }

This Indenture, made this *3rd* day of *May*, 1895, between *T. E. Newlin*, County Clerk and ex officio Clerk of the Superior Court of the County of *Los Angeles*, State of California, party of the first part, and *E. F. Good*, assignee of the estate of *James Brown*, an insolvent debtor, party of the second part,

Witnesseth, That whereas, the said *James Brown* on the *fourth* day of *January*, 1895, presented to the Honorable the Superior Court of the... County of *Los Angeles* his petition, schedule and inventory in pursuance of the provisions of an Act of the Legislature of the State of California, known as the Insolvent Act of 1895; praying to be discharged from all his debts, and such proceedings having been thereupon had, in due form of law, that on the *fourth* day of *January*, 1895, (the creditors, although duly summoned, not having attended on the day appointed for their meeting, and refusing to appoint an assignee), the said Court did, by order then duly made, appoint *E. F. Good* assignee of the estate of said insolvent debtor, and the said assignee having filed a bond as ordered by the Court, to perform, in every respect, the functions of assignee; and for the faithful performance of said trust,

Now, therefore, in consideration of the premises, and of the benefit of said Act, and in pursuance of and in obedience to the above recited order and the said Act, the said party hereto, of the first part, hath assigned and conveyed and by these presents doth assign and convey unto the said party of the second part, his successor, successors, or assigns, all and all manner of real and personal estate, lands, goods, chattels, debts, moneys, deeds, books and papers, and all other things, property and effects of the said *James Brown*, real, personal and mixed, of what kind, nature or quality soever, and wheresoever the same may be situated, and

whether in possession, reversion, remainder, or in action, at the time of the commencement of the said proceedings in insolvency, except such property as is exempt by law from execution.

To have and to hold the same and every part and parcel thereof unto the said party of the second part, his successor, successors, and assigns, forever, to and for the uses and purposes in the said Act declared.

In witness whereof, the said party of the first hath hereunto set his hand and the seal of said Superior Court, the day and year first above written.

[L. s.]

T. E. Newlin,  
Clerk.

[NOTE. The deed of assignment relates back to the acts upon which the adjudication was founded.]

### Form No. 35.

#### Proof of Debt Without Security.

In the Superior Court in and for *Los Angeles* County, State of California.

In the matter of	}	ss.
<i>James Brown,</i>		
An Insolvent Debtor.	}	
State of California,		
County of <i>Los Angeles,</i>		

At the . . . County of *Los Angeles*, State of California, on the *fourth* day of *January*, 1895, before me personally appeared *L. M. Longley*, a resident of the . . . County of *Los Angeles*, State of California, and who, after being duly sworn, says, that *James Brown*, the person by [or against] whom a petition for adjudication of insolvency is filed, *was*, at and before the filing of the said petition, and still *is*, justly and truly indebted to *affiant* in the sum of *one thousand dollars on a promissory note*, and no payments have been made thereon. This deponent says that *he* has not, nor has any person by *his* order, or to this deponent's knowledge or belief, for *his* use, had or received any manner of satisfaction, preference or security whatever for said debt.

And this deponent further says, that the said claim was

not procured for the purpose of influencing the proceedings in this matter; that no bargain or agreement express or implied, has been made or entered into by or on behalf of this deponent to sell, transfer or dispose of said claim, or any part thereof, against said debtor, or to take or receive, directly or indirectly, any money, property or consideration whatever, whereby the vote of this deponent for assignee, or any action on the part of this deponent, or any other person, in the said proceedings, has been, is, or shall be in any way affected, influenced or controlled.

*L. M. Longley.*

Deposing Creditor.

Subscribed and sworn to before me, }  
 this *fourth* day of *January*, 1895. }  
 [L. s.] *T. E. Newlin*, County Clerk.)

I do hereby certify, that the within-contained demand of *L. M. Longley* against *James Brown*, the insolvent debtor within named, was proved to my satisfaction on the *fourth* day of *January*, 1895, for the sum of *one thousand* dollars, and is allowed at that amount.

Dated *January 6*, 1895.

*Henry N. Clement,*

Judge of the Superior Court.

### Form No. 36.

#### Proof of Debt with Security.

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of }  
*Munn & Field*, Copartners, }  
 In Insolvency. }

State of California, }  
 County of *Los Angeles*. } ss.

At the.....County of *Los Angeles*, State of California, on the *sixteenth* day of *August*, 1895, before me personally appeared *A. G. Glass*, a resident of the.....County of *Los Angeles* and State of California, and who, after being duly sworn, says that he is a member of the firm of *Glass & Long*, copartners, and that *John Munn* and *Thomas Field*,

partners, doing business under the firm name of *Munn & Field*, against whom a petition for adjudication in insolvency is filed, *were*, at and before the filing of the said petition, and still *are*, justly and truly indebted to *Glass & Long* for book binding and ruling done for them on the 17th day of May, 1894, at the City of Los Angeles, in the State of California, in the sum of *ninety-five* dollars, and that no payments have been made thereon.

This deponent says that he has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use, received any security or satisfaction whatsoever, save and except the *pledge* hereinafter mentioned; that the claim was not procured for the purpose of influencing the proceedings in this matter; that no bargain or agreement, express or implied, has been made or entered into by or on behalf of this deponent to sell, transfer, or dispose of said claim, or any part thereof, against said debtor, or to take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of this deponent for assignee, or any action on the part of this deponent, or any other person in the proceedings under said statutes, has been, is, or shall be in any way affected, influenced or controlled. At the time of settlement the said *Munn & Field* delivered to our firm a gold watch as a *pledge* to secure the payment of said debt; and the said *Glass & Long* do hereby release the said security, and deliver said *watch* to the Sheriff of said County for the benefit of the estate of said debtor.

A. G. Glass.

Subscribed and sworn to before me, }  
the *sixteenth* day of August, 1895. }  
[L. s.] T. E. NEWLIN, County Clerk. }

State of California, }  
County of *Los Angeles*. } ss.

I do hereby certify that the within-contained demand of *Glass & Long* against *Munn & Field*, the insolvent debtors, within named, with security, as in said deposition stated, was proved to my satisfaction on the *sixteenth* day of August,

1895, for the sum of *ninety-five* dollars, and is allowed at that amount.

Dated *August 16*, 1895.

*H. N. Clement,*  
Judge of the Superior Court.

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### **Power of Attorney Accompanying Claim.**

In the matter of *James Brown*, Insolvent Debtor.

Know all men by these presents: That *A. G. Glass*, whose claim against said Insolvent Debtors has been duly proven, in said matter, does hereby make, constitute and appoint *Graff & Latham*, of *Los Angeles*, Cal., true and lawful attorneys for him and in his name, to vote for or against any proposal or resolution that may be lawfully made or passed at any meeting of the creditors of said insolvent debtors, and in choice of an assignee or assignees of the estate of said debtors; also to....

*A. G. Glass.*

Witness:.....

Dated this....day of....189....

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### **Form No. 37.**

#### **Petition for Homestead Order.**

In the Superior Court in and for the County of *Los Angeles*,  
State of California.

In the Matter of     }  
    *James Brown*,         }  
An Insolvent Debtor.}

To the Honorable the Superior Court of the County of *Los Angeles*, State of California:

The petition of *James Brown* respectfully shows: That on the *first* day of *August* 1895, the said *James Brown* was by the said Court, duly adjudged an insolvent debtor, under the provisions of the Insolvent Act of 1895, of the State of California.

That he is the head of a family consisting of his wife and eleven children. That a certain quantity of land in his inventory and schedules on file, and hereinafter partic-

ularly described, together with the dwelling house thereon, and its appurtenances, was selected by *him*, and was occupied by said insolvent debtor and his family at the time he was adjudged an insolvent debtor, as a homestead; that since the said time of said adjudication, and up to this date, he has remained in possession of said homestead. That the same does not exceed in value the sum of five thousand dollars.

That said selection was made by said insolvent debtor, declaring his intention in writing, to claim the same as a homestead, that said declaration stated the value of said land, and that *he* was married; that *he was* at the time of making such declaration residing with his family on said premises (said premises being particularly described in said declaration,) and that it was his intention to use and claim the same as a homestead, which said declaration was signed by the said party making the same and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded.

That the said quantity of land hereinbefore referred to is situated in said *City of Los Angeles*, County of *Los Angeles*, State of California, and is bounded and particularly described as follows, to wit:

*Lot 7, Block A of the Washington street tract, fronting one hundred feet on Washington street, by 150 feet deep.*

Wherefore, your petitioner prays that the said homestead, consisting of said quantity of land, together with the dwelling-house thereon and its appurtenances, be set apart for the use and benefit of said insolvent debtor.

And your petitioner will ever pray, etc.

Dated *August 20*, 1895.

*James Brown.*

*Veri Smart*, Attorney for Petitioner.

[NOTE. If Homestead has not been declared upon prior to insolvency, the Insolvent is nevertheless entitled to have set apart, (if head of family) a homestead not exceeding \$5000.]



**Form No. 38.****Order to Clerk to Post Notice.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the matter of  
     *James Brown,*  
 An Insolvent Debtor.    } No.

*James Brown*, an insolvent debtor, having filed *his* petition in the above entitled matter, praying an order setting apart to *him* a homestead, in said petition described as exempt from execution, and from administration in by the assignee in said matter: It is ordered that the Clerk of the Court post notice of the filing thereof in at least three public places in said County, at least ten days prior to the time of hearing the same, as required by section 64 of the Insolvent Act of 1895. The *20th* day of *July* 1895, being the time fixed for hearing said petition before me, at 10 A. M. of that day.

*A. Leslie,*  
 Judge of Superior Court.

**Form No. 39.****Notice of Application to Set Apart Exempt Property.**

In the matter of the Estate of  
     *James Brown,*  
 An Insolvent Debtor.    }

Notice is hereby given that *James Brown*, an insolvent debtor, has filed with the Clerk of this Court a petition, praying for an order of court setting apart to said insolvent debtor, as his separate estate, real and personal property exempt from execution, the following being the property asked to be set apart to him, to wit: [Here describe the property.]

And that *Monday*, the *twentieth* day of *July*, A. D. 1895, at 10 o'clock A. M. of said day, at the court room of this court, *Department Five* thereof at the Court House in the *City of Los Angeles*, State of California, has been set for hearing said petition, when and where any person interested

may appear and show cause why the said petition should not be granted.

Dated *July 10th*, 1895.

*T. E. Newlin*,

Clerk.

By *S. M. Whittemore*,

Deputy Clerk.

### Form No. 40.

#### Affidavit of Posting.

State of California, }  
County of *Los Angeles*. } ss.

*S. M. Whittemore*, being duly sworn, says that on the *10th* day of *July*, A. D. 1895, at the request of the Clerk of the Superior Court of the said County of *Los Angeles*, he posted three notices, of which the foregoing is a copy, in three of the most public places in the said County of *Los Angeles*, to wit: One of the said notices at the County Clerk's office, one at [Describe places.]

*S. M. Whittemore*.

Subscribed and sworn to before me }  
this *16th* day of *July*, 1895. }

*T. E. Newlin*, Clerk.

By *W. H. Dunsmoor*, Deputy Clerk.

### Form No. 41.

#### Order Setting Apart Homestead.

In the Superior Court in and for *Los Angeles* County,  
State of California.

In the Matter of }  
*James Brown*, }  
An Insolvent Debtor. }

*James Brown*, an insolvent debtor, having on the *twentieth* day of *August* 1895, made application to this court, by petition, for an order setting apart, for the use and benefit of said insolvent debtor, the homestead in said petition and hereinafter particularly described, together with the dwelling-house thereon and its appurtenances; and it duly appearing to said court from the papers on file, and other evidence, that

the prayer of said petition should be granted; and proof having been produced to the satisfaction of the court that notice of said petition was duly given to the creditors of said *James Brown*, as required by section 64 of the Insolvent Act of 1895.

It is hereby ordered, adjudged and decreed, that all that certain lot, piece, or parcel of land situate, lying and being in the *City of and County of Los Angeles*, State of California, and bounded and described as follows, to wit:

*Lot 7 of the Washington Street Tract, fronting one hundred feet on Washington Street, by 150 feet deep,*

Together with the dwelling-house thereon and its appurtenances, be, and the same is hereby set apart for the use and benefit of the said insolvent debtor; and that the same shall not be subject to be applied to the payment of his debts.

And it is further ordered, that a certified copy of this decree be duly recorded in the office of the County Recorder of said . . . . . County of *Los Angeles*.

Dated *August 29, 1895*.

*Henry N. Clement,*  
Judge of the Superior Court.

### **Form No. 42.**

#### **Petition for Order Setting Apart Personal Property.**

In the Superior Court in and for *Los Angeles*, County, State of California.

In the Matter of }  
*James Brown,* }  
An Insolvent Debtor.)

To the Honorable the Superior Court of the . . . . . County of *Los Angeles*, State of California.

The petition of *James Brown*, an insolvent debtor, respectfully shows: That on the *first* day of *June*, 1895, the said petitioner was, by the said court, duly adjudged to be an insolvent debtor, under the provisions of the Insolvent Act of 1895 of the State of California. That your petitioner is advised and believes that the following personal property

belonging to said estate, and mentioned in his inventory and schedules, on file in this matter, is by law exempt from execution, to wit:

*One sewing machine, one set of bed-room furniture, one dining-room set, and one cooking stove and dishes, and utensils for cooking, and the necessary clothing for eleven children and self and wife, all valued at about three hundred dollars.*

Wherefore, your petitioner prays that all of the said personal property may be set apart for the use and benefit of the said insolvent debtor, and that an order be made requiring the Clerk of the Court to give notice of this petition to the creditors of petitioner, as required by section 64 of the Insolvent Act of 1895.

And your petitioner will ever pray, etc.

Dated *July 20, 1895.*

*James Brown,*  
Insolvent.

*Veri Smart,*  
Attorney for Insolvent.

[NOTE.—Order for posting notice same as No. 38, and notice to be posted same as No. 39.]

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### **Form No. 43.**

#### **Order Setting Apart Personal Property.**

In the Superior Court in and for the County of *Los Angeles*  
State of California.

In the Matter of }  
*James Brown,* }  
An Insolvent Debtor. }

*James Brown*, an insolvent debtor, having this day made application to this Court, by petition, for an order setting apart, for the use of the said insolvent debtor, all personal property which is by law exempt from execution, and the matter having been duly considered, and proofs having been produced to the satisfaction of the Court that notice of said petition has been duly given to the creditors of said *James Brown*, as required by section 64 of the Insolvent Act of 1895,

It is hereby ordered, that the following articles of personal property, to wit:

*One sewing-machine, one set of bed-room furniture, one dining-room set, and one cooking stove and dishes, and utensils for cooking, and the necessary clothing for eleven children, and for petitioner and his wife, all valued at about three hundred dollars, be and the same are hereby set apart for the use and benefit of the said insolvent debtor, and that the same shall not be subject to be applied to the payments of his debts.*

*Dated August 29, 1895.*

*Henry N. Clement,*  
Judge of the Superior Court.

#### **Form No. 44.**

#### **Petition for Discharge.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*James Brown,*  
An Insolvent Debtor. }

To the Honorable the Superior Court in and for the County of *Los Angeles*:

The petition of *James Brown* respectfully represents that on the *tenth* day of *June, 1895*, he was duly declared and adjudged an insolvent, under the provisions of an act of the Legislature of the State of California, entitled "An Act for the Relief of Insolvent debtors, for the Protection of Creditors, and for the punishment of Fraudulent Debtors," known as the Insolvent Act of eighteen hundred and ninety-five that he duly surrendered all his property, and rights of property, and has fully complied with and obeyed all the orders and directions of the Court touching his insolvency aforesaid; and that he is ready to submit to any further examinations, orders, and directions which the Court may require.

Wherefore your petitioner prays that he may be decreed by this honorable court to have a full discharge from all his debts, and that a certificate of discharge may be granted to him in accordance with law.

*James Brown*, Petitioner.

*Timothy Jenkins*, Attorney for Petitioner.

**Form No. 45.****Order for Notice to Creditors.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the matter of  
*James Brown*  
 An Insolvent Debtor. }

*James Brown*, an insolvent debtor, having applied to this Court for a discharge from his debts,

It is hereby ordered, that the clerk of this court give notice to all creditors who have proved their debts, to appear before this court, at the court room of Department *five* thereof, on the *15th day* of *October*, 1895, at the hour of *ten o'clock A. M.*, and show cause if any they have, why the said *James Brown* should not be discharged from all his debts, in accordance with the statutes in such cases made and provided.

It is further ordered, that notice of said application be given to the creditors by mail, and by publication of this order *once a week* for four weeks in the *Weekly Times*, a newspaper published in said *Los Angeles* County.

Dated *Sept. 2nd*, 1895.

*Lucien Shaw*,  
 Judge of the Superior Court.

**Form No. 46.****Affidavit of Publication.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*James Brown*,  
 An Insolvent Debtor. }

State of California,  
 County of *Los Angeles*. } ss.

*Sam Lee* being duly sworn, says that he is over the age of eighteen years and not interested in the matter of *James Brown*, an insolvent debtor.

That he is the *principal clerk* of the *Weekly Times*, a newspaper of general circulation, printed and published in

the city of *Los Angeles*, said county of *Los Angeles*, and as such he has charge of all advertisements in said paper.

That a true, full and correct copy of the annexed notice for discharge in the matter of said insolvency, was published in said newspaper on the following days, to wit: on the *8th, 15th, 22nd and 29th* days of *September 1895* respectively.

*Sam Lee.*

Subscribed and sworn to before me }  
this *1st* day of *October*, A. D. 1895. }

*T. E. Newlin,*

Clerk.

By *W. H. Dunsmoor,*

Deputy Clerk.

### Form No. 47.

#### Affidavit of Clerk.

In the Superior Court in and for *Los Angeles* County,  
State of California.

In the Matter of }  
*James Brown,* }  
An Insolvent Debtor. }

State of California }  
County of *Los Angeles.* }

*Frank Hopkins* being duly sworn, on oath says that he is *Deputy* County Clerk in and for said County of *Los Angeles*; and that on the *5th* day of *June*, 1895, he served notice to the creditors of said *James Brown*, an insolvent debtor, of his application for discharge from all his debts, on file in said Court, by depositing said notices, on said date, in the Post Office at the *City of Los Angeles*, inclosed in envelopes, addressed one to each of the creditors of said insolvent who have proved their debts, at their several and respective places of residence, and prepaid the postage thereon. The annexed being a copy of the notice served.

*Frank Hopkins,*

*Deputy* County Clerk.

Subscribed and sworn to before me }  
this *7th* day of *June*, 1895. }

*T. E. Newlin,* County Clerk.

**Form No. 48.**  
**Oath of Insolvent.**

In the Superior Court in and for *Los Angeles* County  
State of California.

In the Matter of        }  
    *James Brown,*       }  
An Insolvent Debtor.   }  
State of California,   }  
    County of *Los Angeles.*}

*James Brown*, being duly sworn, says, that he has applied to the Superior Court in and for *Los Angeles* County, for discharge from his debts, under the provisions of an Act of the Legislature of the State of California, entitled "An Act for the Relief of Insolvent Debtors, for the Protection of Creditors, and for the Punishment of Fraudulent Debtors," known as the Insolvent Act of eighteen hundred and ninety-five; that he has not done, suffered, or been privy to any act, matter, or thing specified in the said Act as grounds for withholding such discharge, or as invalidating such discharge if granted.

*James Brown,*  
Insolvent Debtor.

Subscribed and sworn to before me,}  
this *fifteenth* day of *October*, 1895.}  
    *S. E. Monje*, Notary Public.

**Form No. 49.**  
**Opposition to Discharge.**

In the Superior Court, in and for *Los Angeles* County, State  
of California.

In the Matter of        }  
    *James Brown,*       }  
An Insolvent Debtor.   }

*James Brown*, claiming to be an insolvent debtor within the provisions of an act of the Legislature of the State of California, entitled "An Act for the Relief of Insolvent Debtors, for the protection of Creditors, and for the punishment of fraudulent Debtors," known as the Insolvent Act, of eighteen hundred and ninety-five, having filed his appli-



cation for discharge from his debts, now comes *Daniel Newton*, a creditor of said insolvent and opposes the discharge of said debtor upon the following grounds: The said *James Brown*, upon the 4th day of *May*, 1895, with intent to defraud his creditors, and being insolvent, did give to his brother, *Henry Brown*, five hundred dollars in gold coin, and that none of the said money has been surrendered to the assignee appointed by this court.

Wherefore the said creditor prays that the said *James Brown* may not be discharged from his debts, as applied for by him.

*Daniel Newton.*

*S. C. Hume*, Attorney for the Creditor.

State of California, }  
County of *Los Angeles* }

*Daniel Newton*, being duly sworn, says that he is a creditor of said insolvent; that he has heard read the foregoing specifications of opposition to the discharge of *James Brown*, and that the same is true of his own knowledge, except as to those matters therein stated on information or belief, and as to those matters he believes it to be true.

*Daniel Newton.*

Subscribed and sworn to before me }  
this first day of *September*, 1895. }

*F. I. Moses*, Notary Public.

### Form No. 50.

#### Certificate of Discharge.

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of }  
*James Brown*, }  
An Insolvent Debtor. }

Whereas, *James Brown* has been duly adjudged an insolvent under the insolvent laws of this state, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said *James Brown* be forever discharged from all debts and claims, which by said insolvent laws are made provable against his estate, and which existed on the first day of *June*, 1895,

on which the petition of adjudication was filed by [or against] him, excepting such debts, if any, as are by said insolvent laws excepted from the operation of a discharge in insolvency.

Given under my hand, and the seal of the Court, this twentieth day of September, 1895.

*Lucien Shaw*, Judge.

Attest:

*T. E. Newlin*,  
Clerk.

[SEAL.]

### Form No. 51.

#### Creditors' Petition in Involuntary Insolvency.

In the Superior Court in and for the County of *Los Angeles*,  
State of California.

In the Matter of *John Munn and* )  
*Thomas Field*, partners under the )  
*name and style of Munn & Field*, )  
In Insolvency.

The petition of the hereinafter mentioned creditors respectfully shows: That *John Munn and Thomas Field*, partners under the name and style of *Munn & Field*, are indebted to the following petitioners, all residents of the State of California:

To *Glass & Long*, a partnership, in the sum of \$95.00, for book binding and ruling done for and delivered to said *Munn & Field*, within twenty-three months last past.

To *Chas. W. Palm Co.*, a partnership, in the sum of \$175.00, for printing briefs and transcripts, delivered to said *Munn & Field*, within twenty-three months last past.

To *C. W. Furrey Co.*, a corporation, in the sum of \$250.00, for goods sold and delivered to said *Munn & Field*, within twenty-three months last past.

To *Quirk, Gammon & Snap*, a partnership, in the sum of \$250.00, for services as attorneys rendered said *Munn & Field*, within twenty-three months last past.

To *Harvey Goodkind*, in the sum of \$100.00, for goods sold and delivered to said *Munn & Field*, within twenty-three months last past.

That all said demands accrued in this State. That all said sums are due and unpaid, and have not been assigned to the petitioners, in whole or in part. That said debtors reside and have *their* place of business in said . . . County of *Los Angeles*, State of California, and have permitted *their* property to remain under attachment for over three days, and that *they are* insolvent and have so been before and ever since said attachment was levied on *their* property; that the said insolvents have no other property. (Or, that said debtors have procured their property to be taken under legal process issued in an action brought by *D. Richardson & Co.*, with intent to give a preference to said *D. Richardson & Co.*; or have, to wit, on the *20th* day of *May*, 1895, made a transfer of all the goods and property of said partnership to *D. Richardson & Co.*, with intent to hinder, delay and defraud the creditors of said partnership, etc. And if a receiver or injunction is desired.) And that in order that all of the property of said insolvents be not transferred, and covered up by false claims of said *D. Richardson & Co.*, and persons unknown to petitioners, and removed from the jurisdiction of this Court, it is now necessary that suit be commenced to recover the same.

That it is necessary for the preservation of the estate of said debtors that said debtors be restrained from receiving the payment of any debts and the delivery of any property, and from transferring any property, and that all persons, corporations or associations indebted to said debtors, or having in their possession property belonging to said debtors, be forbidden to make payment of such debts, or to deliver such property to said debtors, or to any one for the use of said debtors.

Wherefore, petitioners pray, that the said debtors show cause, at a time ~~and~~ place to be fixed by this Honorable Court, why ~~(they as such partnership)~~ should not be adjudged insolvent, and the surrender of ~~(their)~~ <sup>the</sup> ~~estates~~ be made for the benefit of all ~~(their)~~ <sup>the</sup> creditors; that no creditor whose debt is provable under said act be allowed to prosecute to final judgment any action therefor against said debtors until the question of discharge shall have been determined: and that any and all such suits and proceedings be stayed until the

further order of the Court; that all persons be forbidden to pay any debts to said debtors or to deliver any property belonging to *them* or to any person, firm, corporation or association, for *their* use; that said debtors be forbidden to transfer or deliver any property; that a receiver be appointed to at once take charge of all the estate of said partnership and preserve the same, and institute such suit or suits as may be necessary to recover the same, and that all such proceedings may be had and taken as the law in such cases prescribes.

*Charles Choate,*  
Attorney for Petitioners.

State of California, }  
City and County of San Francisco. } ss.

*A. G. Glass, Harvey Goodkind, and Oily Gammon*, being each severally sworn, doth say on oath: That he is one of the petitioning creditors in this proceeding; that he has heard read the foregoing petition, and is acquainted with the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon his information or belief, and as to those matters he believes it to be true; that said *A. G. Glass* is a member of the firm of *Glass & Long*, one of the petitioners herein; that said *Oily Gammon* is a member of the firm of *Quirk, Gammon & Snap*, one of the petitioners herein.

*A. G. Glass.*  
*Harvey Goodkind.*  
*Oily Gammon.*

Subscribed and sworn to before me, }  
this 5th day of September, 1895. }

*S. E. Monje,*

Notary Public.

**Form No. 52.****Bond of Petitioning Creditors.**

In the Superior Court in and for *Los Angeles* County, State of California.

Department No. . . .

In the Matter of *John Munn and Thomas Field, partners, under the name of Munn & Field,* }  
In Insolvency.

Whereas, *Glass & Long, Chas. W. Palm & Co., W. C. Furrey Co., a corporation, Quirk, Gammon & Snap, and Harvey Goodkind,* are about to file a petition in the Superior Court of the County of *Los Angeles*, stating that *John Munn and Thomas Field, copartners, are insolvent*, and praying that they be declared Insolvent Debtors,

Now, we, *Glass & Long, Chas. W. Palm & Co., W. C. Furrey Co., (a corporation), Quirk, Gammon & Snap, and Harvey Goodkind,* as principals, and *Max Newberg, and Daniel Meyer* as sureties, are firmly held and bound unto said *John Munn and Thomas Field* in the penal sum of Five Hundred Dollars, to be paid to said *John Munn and Thomas Field, their attorney, executors, administrators or assigns*, in which payment, well and truly to be made, we bind ourselves, and each of us, our heirs, executors and administrators, jointly and severally, firmly by these presents.

The condition of this obligation is such that, if the said petitioners shall pay all costs and damages, including a reasonable attorney's fee, that the said *John Munn or Thomas Field* may sustain, by reason of the filing of said petition, if said *Munn and Field, or either of them*, shall not be declared an insolvent, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed with our seals, and dated the *29th* day of *September*, 1895.

<i>Glass &amp; Long.</i>	}	Principals.
<i>Chas. W. Palm &amp; Co.</i>		
<i>W. C. Furry Co., by C. L. Hopkins, Secy.</i>		
<i>Quirk, Gammon &amp; Snap.</i>		
<i>Harvey Goodkind.</i>		
<i>Max Newberg.</i>	}	Sureties.
<i>Daniel Meyer.</i>		

State of California, }  
 County of *Los Angeles*. } ss.

*Max Newberg and Daniel Meyer*, the sureties whose names are subscribed to the above bond, being severally duly sworn, each for himself, says that he is a resident and freeholder within said State, and is worth the sum in the said bond specified as the penalty thereof, over and above his just debts and liabilities, exclusive of property exempt from execution.

*Max Newberg.*  
*Daniel Meyer.*

Subscribed and sworn to before me, this *29th* day of *September*, 1895.

*A. E. Meservy*,  
 Notary Public in and for the County of *Los Angeles*, State of California.

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### Form No. 53.

#### **Affidavit for Service by Publication.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*John Munn and Thomas Field*, }  
*Partners under the firm name of* } No.  
*Munn & Field*, }  
 In Insolvency.

State of California, }  
 County of *Los Angeles*. } ss.

*A. G. Glass*, being duly sworn, deposes and says, that he is a member of the firm of *Glass & Long*, copartners, who are petitioning creditors in the above entitled matter of *Munn & Field*, insolvent debtors; that he knows both *John Munn* and *Thomas Field*; that on the *1st* day of *September* 1895, they both departed from the state of California, and are now in the *City of New York*, state of *New York*, and that personal service of the order in the above entitled matter to show cause, cannot be made upon either of them in this state.

*A. G. Glass.*

Subscribed and sworn to before me  
 this *3rd* day of *September*, 1895. }

*T. E. Newlin*, County Clerk.

**Form No. 54.****Order for Publication of Order to Show Cause.**

In the Superior Court in and for *Los Angeles* County,  
State of California.

In the Matter of <i>John Munn and Thomas Field,</i> <i>Partners doing business under</i> <i>the firm name of Munn &amp; Field,</i> In Insolvency.	}	No.
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Upon reading and filing the affidavit of *A. G. Glass* and it satisfactorily appearing therefrom to me that the defendants *John Munn and Thomas Field*, cannot, after due diligence, be found within this State, and it also appearing from the petition of creditors of said *Munn & Field* that proceedings in insolvency have been instituted against them, upon legal grounds duly stated in said petition, and that the said defendants are necessary and proper parties, on the 3rd day of *December*, 1895, this Court made an order in said matter of insolvency requiring the said *John Munn and Thomas Field*, to show cause *why* they should not be adjudged insolvent, and that personal service of said order cannot be made upon said defendants *John Munn and Thomas Field* for the reasons hereinbefore contained, and by the said affidavit made to appear; on motion of *Charles Choate*, Esq., attorney for the petitioning creditors, it is ordered that the service of said order to show cause in this matter be made upon the defendants *John Munn and Thomas Field* by publication thereof in the "*Daily Herald*" a newspaper published at the *City of Los Angeles*, in said County, which is hereby designated as the newspaper most likely to give notice to said defendants; that said publication be made at least once a week for *two* months.

And it further in like manner satisfactorily appearing to me that the residence of said defendants *John Munn and Thomas Field*, is at the *City of New York*, State of *New York*, it is ordered and directed that a copy of said order to show cause and of the petition in this matter be forthwith

deposited in the United States postoffice, postpaid, directed to said defendants at *their* said place of residence.

Dated *September 30th*, 1895.

*M. Y. Waldo*,  
Judge Superior Court.

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**Form No. 55.**

**Bond of Creditors for Sheriff to Take Property.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*John Munn and Thomas Field*,  
*Partners doing business under the*  
*firm name of Munn & Field.* }

In Insolvency.

Whereas *Glass & Long* [and other petitioning creditors, giving their names] have filed in the said Superior Court their petition as creditors of said insolvents named in the above entitled matter, and therein praying an order requiring said insolvents to show cause why they should not be adjudged insolvents, and said Court thereupon having made the order as therein prayed for; the claims of said petitioning creditors against the estate of said insolvents being in the aggregate \$420.00 and an affidavit requisite to procure an order for service by publication upon said insolvents having been submitted to said Court,

Now, therefore, we, the undersigned, residents of the County of *Los Angeles* in consideration of the premises, and of the issuing of an order by this Court directing the Sheriff of said County of *Los Angeles* to take into custody a sufficient amount of property of said insolvents to satisfy the demands of said petitioning creditors and the costs of the proceedings, do jointly and severally undertake in the sum of *eight hundred and forty* dollars and promise to pay said *John Munn and Thomas Field* all damages sustained by them by reason of said insolvency proceedings, not exceeding the amount of this bond, conditioned that if, upon final hearing of said petition in insolvency the Court



shall find in favor of said petitioners, then this bond shall be void.

Dated the 30th day of September, 1895.

*Glass & Long,* [SEAL.]

*De V. Marion.* [SEAL.]

*Max Newberg.* [SEAL.]

[All creditors uniting in the petition should sign the bond as principals. Qualification by sureties same as form 52.]

### Form No. 56.

#### Order for Sheriff to take property.

In the Superior Court in and for *Los Angeles* County, State of California.

<p>In the matter of <i>John Munn and Thomas Field,</i> <i>Partners doing business under the</i> <i>firm name of Munn &amp; Field,</i></p>	}	No.
In Insolvency.		

The petitioning creditors in the above entitled matter having submitted to the court the affidavit of *A. G. Glass*, one of said petitioning creditors, the same being sufficient to procure an order for service by publication of the order to show cause in said matter; and also having presented to the court a good and sufficient bond payable to said debtors in double the aggregate sum of their claims against said debtors, as authorized by sections 16 and 17 of the Insolvent Act of 1895; *William Burr*, the sheriff of said County of *Los Angeles*, is hereby ordered and directed to take into his custody and hold until the further order of this court, a sufficient amount of the property of said debtors to satisfy the demands of said petitioning creditors and the costs of the proceedings; and prepare and return to this court within three days from the time of taking said property, a complete inventory thereof.

Done in open court this 30th day of May, 1895.

*M. Y. Waldo,*

Judge of the Superior Court.

**Form No. 57.****Order to Show Cause, upon Creditor's Petition.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*Munn & Field, Copartners,* }  
 In Insolvency.

Upon reading and filing the petition of *Glass & Long*, and *Chas. W. Palm & Co.*, *C. W. Furrey Co.*, a corporation, *Quirk, Gammon & Snap*, and *Harvey Goodkind*, properly verified, and accompanied by the bond required by law, and upon motion of *Charles Choate, Esq.*, counsel for petitioners, it is hereby ordered that the said *John Munn and Thomas Field* show cause, by appearance herein, at the Court room of *Department 6* of this Court, in the County of *Los Angeles* at 10 o'clock A. M. of *Monday the 29th day of June* A. D. 1895, why they should not be adjudged insolvent debtors pursuant to the provisions of the Insolvent Act of eighteen hundred and ninety-five, of the State of California.

And good cause therefor appearing by the verified petition and affidavits on file herein, it is further ordered, that all persons be and they are hereby forbidden to make payment of any debts or delivery of any property belonging to said *John Munn or Thomas Field* to him or for his use, and the said *John Munn and Thomas Field* are forbidden to transfer any of their property otherwise than as by law and this Court may be directed.

And it satisfactorily appearing to the Judge of this Court by the verified petition of said petitioning creditors that proper and sufficient cause, under section 67 of said Insolvent Act exists therefor, *William Burr* is hereby appointed a receiver to take charge of all the property and effects of said *John Munn and Thomas Field* (excepting property which is by law exempt from execution and attachment,) and of all accounts, books of account, bills, notes and assets properly belonging to the estate of said partnership and of said *John Munn and Thomas Field*, and to preserve and manage the same under direction of this Court and conformably to law. And that said receiver, execute a bond to the State of

California with one or more sureties to be approved by the Judge of this Court in the sum of *ten thousand dollars*, and take and subscribe the usual oath of office. Said bond to be conditioned as required by section 567 of the Code of Civil Procedure of the State of California. And that all proceedings against said debtors be stayed as provided in section 49 of said Insolvent Act.

It is further ordered that a copy of the said petition of said creditors, together with a copy of this order be forthwith served upon said *John Munn and Thomas Field*, personally, in the same manner provided for the service of summons in civil actions in this State, and that such service be made at least five days before the time in this order fixed for the hearing herein.

Dated this *29th* day of *June*, 1895.

*M. Y. Waldo*, Judge.

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### Form No. 58.

#### Order of Adjudication, etc. (Involuntary.)

In the Superior Court in and for *Los Angeles* County, State of California.

In the matter of  
*Munn & Field, Copartners,* }  
 In Insolvency.

In the matter of the petition of *Glass & Long*, [and other petitioning creditors, naming them] praying that *John Munn and Thomas Field*, partners doing business under the firm name of *Munn & Field* may be adjudged to be insolvent debtors, coming on regularly to be heard this *1st* day of *September*, 1895, and *Charles Choate* appearing for said petitioners, and *Uriah Herrin* appearing for said debtors, and it further appearing to the court that the said *John Munn and Thomas Field* after being duly and regularly served, have made default; and it further appearing to the court that all of the allegations contained in said petition are true,

It is hereby ordered, adjudged and decreed, that the said *John Munn and Thomas Field* now are, and on the *1st* day of *May*, 1895, the date of the filing of the petition aforesaid, were insolvent debtors within the true intent

and meaning of an Act of the Legislature of the State of California, known as the Insolvent Act of 1895, and were guilty of the acts charged in said petition. And it is further ordered, that the said *John Munn and Thomas Field* file in this court within *ten* days from the date hereof, a schedule and inventory, in accordance with sections three and four of the said act.

Done in open Court this *30* day of *May*, 1895.

*William Blackstone,*  
Judge of the Superior Court.

### Form No. 59.

#### Voluntary Petition by Partnership.

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of *Nathaniel B. Hancock* }  
and *Silas W. Hunter*, copartners, do- }  
ing business under the name and style }  
of *Hancock & Hunter*, }  
In Insolvency.

To the Honorable, the Superior Court in and for *Los Angeles* County, California.

The petition of *Hancock & Hunter*, a copartnership, respectfully shows:

That said *Nathaniel B. Hancock* and *Silas W. Hunter* are and for a long time past have been copartners in the business of *wholesale commission merchants*, at the *City and County of San Francisco*, and in the *City of Los Angeles*, in *Los Angeles County*, State of California, conducting their said business under the name and style of *Hancock & Hunter*. That the said *Nathaniel B. Hancock* is and for more than six months last has resided and does now reside in said *City and County of San Francisco*, and the said *Silas W. Hunter*, for more than six months last past has resided and does now reside at the said *City of Los Angeles*. That the principal place of the business of said partnership during said time has been and now is at said *City of Los Angeles*.

That the said petitioners have become involved in indebtedness to such extent that they are unable to pay their

debts and liabilities in full, and are willing to surrender all their estate and effects for the benefit of their creditors, and are desirous of obtaining a discharge from their debts and liabilities, and have hereto annexed and hereby present as part of this petition a schedule and inventory, and valuation of all the assets and liabilities of said petitioners in compliance with sections 3 and 4 of the Insolvent Act of eighteen hundred and ninety-five, and according to the best of their ability, knowledge and belief, and which schedule and inventory are all parts of this petition.

Wherefore, etc., [same as in petition of individual debtor.]

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### Form No. 60.

#### Petition on Behalf of Corporation.

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*The Union Plumbers, a corporation,* }  
 In Insolvency.

To the Honorable the Superior Court, in and for said *Los Angeles* County.

The petition of *Harvey Goodkind* respectfully shows:

That he is an officer, to wit, the president of the "*Union Plumbers*," a corporation duly organized and existing under the laws of the State of California. That at a meeting of the *Trustees* [or board of directors] of said corporation at a meeting specially called for that purpose and held at the office of said corporation in the *City of Los Angeles*, in the County of *Los Angeles* and State of California, on the . . . day of . . . 1895, [or by assent in writing of a majority of the directors or trustees,] your petitioner was directed and authorized to apply for a discharge of said corporation from its debts in pursuance with the Act of the Legislature of the State of California, designated and known as the "Insolvency Act of eighteen hundred and ninety-five," a copy of which resolution [or assent] is as follows: [insert]

That the board of directors [or trustees] of said corporation consists of five members only, to wit: [insert]

[Allege residence, or principal place of business and indebtedness exceeding \$300, and insolvency, and proceed same in a voluntary petition of individual debtor.]

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**Form No. 61.**

**Minutes of Clerk in Electing Assignee.**

[See Form No. 30, p. 218.]

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**Form No. 62.**

**Order Fixing Bond of Assignee.**

[See form No. 31, p. 219.]

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**Form No. 63.**

**Notice to Assignee.**

[See form No. 32, p. 219.]

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**Form No. 64.**

**Bond of Assignee.**

[See Form No. 33, p. 220.]

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**Form No. 65.**

**Assignment by Clerk to Assignee.**

[See Form No. 34, p. 221.]

**Form No. 66.****Assignee's Notice of Appointment.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*James Brown,* } No.  
 An Insolvent Debtor. }

Notice is hereby given that, on the *10th* day of *August*, 1895, in said Superior Court, the undersigned was duly appointed, the assignee of the estate of *James Brown*, who in the above entitled matter, was by said Court, on the *30th* day of *May*, 1895, adjudged an insolvent debtor on his own petition.

*August 10th*, 1895.

*Peter Verne*, Assignee.  
*17 Broadway.*

**Form No. 67.****Petition for Sale of Property.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*James Brown,* }  
 An Insolvent Debtor. }

To the Honorable the Superior Court in and for the County of *Los Angeles*.

The petition of *Peter Verne* respectfully shows: That he is the duly appointed, qualified and acting assignee of the estate of *James Brown*, an insolvent debtor, now pending in said Court: That as such assignee he has taken possession of all the estate described in the inventory of said insolvent. That in order to pay the debts of said insolvent it is necessary to sell all his estate vested in petitioner as such assignee.

Wherefore, petitioner prays for an order of this Court, authorizing him to sell at *public auction* all the estate, real and personal, vested in him as such assignee, upon the following terms, to wit, *for cash*: And upon such sale to exe-

cute to the purchaser the necessary conveyances and bills of sale.

The following is a description of the real estate belonging to said insolvent debtor's estate, situated in the County of *Los Angeles*, State of California, and bounded and described as follows, to wit:

[*Description by metes and bounds.*]

Dated *August 10*, 1895.

*Peter Verne*, Assignee.

*Abel Counsel*, Attorney for Assignee.

### **Form No. 68.**

#### **Petition to Sell Perishable Property.**

In the Superior Court in and for *Los Angeles* County  
State of California.

In the Matter of        }  
    *James Brown*,         }  
An Insolvent Debtor.)

*Peter Verne*, assignee of the estate of *James Brown*, an insolvent debtor, petitions this Court for an order to sell the following described property belonging to the said estate, viz:

[*Description.*]

Petitioner states that said property is of a perishable nature, and is liable to deteriorate in value, or is disproportionately expensive to keep; and it will be for the best interests of the said estate to sell the said property immediately. That a private sale of said property will realize more than at public auction, for the reason [give reasons for private sale.]

Wherefore, petitioner prays for an order to sell all, or any part of, said property at private sale.

Dated *July 10*, 1895.

*Peter Verne*, Assignee.

*Abel Counsel*, Attorney for Assignee.



**Form No. 69.****Order for Notice of Application to Sell.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*James Brown,*  
 An Insolvent Debtor. } No.

*Peter Verne*, the assignee of the estate of *James Brown*, an insolvent debtor having filed his petition in this court asking for an order to sell certain property, of the estate of said debtor at private sale: It is ordered that the *1st* day of *August*, 1895, be set as the day for hearing of said petition at *10 A. M.*, in the court room of *Department 5* of said court; and that said assignee give notice of the hearing of said petition to the creditors of said insolvent by serving on each a copy of this order by mail, and by publication of this order in *The Daily Herald*, a newspaper published in said County of *Los Angeles*, as often as said paper is published before the day set for hearing of said petition.

*William Blackstone,*  
 Judge of the Superior Court.

Dated *August 12*, 1895.

State of California, }  
 County of *Los Angeles*, } ss.

*Peter Verne*, being duly sworn, says: That he is the assignee of the estate of *James Brown*, an insolvent debtor. That he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon his information or belief, and that as to those matters he believes it to be true.

*Peter Verne.*

Subscribed and sworn to before me }  
 this *1st* day of *August*, 1895. }

[L. S.]

*Franklin Jordan,*  
 Notary Public.

**Form No. 70.****Order to Sell Perishable Property.**

In the Superior Court, in and for *Los Angeles*, County State  
of California.

In the Matter of }  
*James Brown*, }  
An Insolvent Debtor. }

Upon reading and filing the petition of *Peter Verne*, the assignee of the estate of *James Brown*, an insolvent debtor praying for an order to sell at private sale certain property described in said petition. And it appearing to the court that it is for the best interests of said estate that said property should be sold at private sale, as prayed for in said petition: It is ordered that the said assignee sell said property at private sale, with or without notice, as he may deem best for the interests of the estate.

*William Blackstone*,  
Judge of the Superior Court.

Dated *August 15th*, 1895.

**Form No. 71.****Order for Sale of Property.**

In the Superior Court in and for *Los Angeles* County, State  
of California.

In the Matter of }  
*James Brown*, }  
An Insolvent Debtor. }

*Peter Verne*, the assignee of the estate of *James Brown*, said insolvent debtor, having filed *his* petition, praying for an order to sell *certain real estate*, belonging to said estate, and it appearing to the court that it is for the best interest of said estate to sell *all the real estate* of the said insolvent debtor, vested in the assignee: It is ordered that the said assignee sell at public auction, giving 20 days previous notice thereof by publication in the *Daily Herald*, a newspaper published in said county, of the time, place and conditions of said sale, all the said *real estate*; That said property be sold to the highest bidder for *cash*; That if the said property be not disposed of upon the day

fixed in the said notice of said sale, then the sale may be continued from day to day until all said property is disposed of. The following is a description of the real estate which is ordered to be sold. Situated in the *City of Los Angeles* and County of *Los Angeles*, State of California, and bounded and described as follows, to wit: [*Description.*] Upon any sale being made, the assignee shall execute to the purchaser all necessary conveyances.

*William Blackstone,*  
Judge of the Superior Court.

Dated *September 1st*, 1895.

### Form No. 72.

#### Petition for Leave to Compound.

In the Superior Court, in and for *Los Angeles* County, State of California.

In the Matter of  
*James Brown,*  
An Insolvent Debtor. }

To the Honorable the Superior Court of the County of *Los Angeles*:

The petition of *Peter Verne* respectfully shows: That he is the assignee of the estate of *James Brown*, an insolvent debtor, and was duly appointed such assignee in and by this Court; that the following named person is indebted to said estate in the sum set opposite *his* name, viz:

*Alex. Bailey* . . . . . \$200.00

That the said debtor has no property out of which the said sum could be made upon execution; but he offers to pay twenty cents on the dollar of his indebtedness, in full discharge, and petitioner believes it is therefore for the best interests of said estate to compound said debt with said debtor, by accepting less than the sum due, and in full payment, and upon payment of the sum agreed upon, to discharge said debtor from said debt.

Wherefore, petitioner prays for an order authorizing him to compound with said debtor, and upon payment of the

sum agreed upon, to discharge all demand of said estate against said person.

Dated *August 10th*, 1895.

*Peter Verne*, Assignee.

*Abel Counsel*, Attorney for Assignee.

### Form No. 73.

#### Order to Compound.

In the Superior Court in and for *Los Angeles* County, State of California.

In the matter of  
*James Brown*,  
 An Insolvent Debtor. }

*Peter Verne*, assignee of the estate of *James Brown*, an insolvent debtor, having filed his petition praying for an order to compound with a certain debtor of said estate, and it appearing to the court that it is for the best interests of said estate for such settlement to be made as prayed for in said petition, it is ordered that the prayer of said petition be granted, and that the said assignee be, and he is hereby granted full power and authority to compound with said debtor upon such terms and conditions as he may deem best for said estate; *provided, he secure from him not less than 20 per cent. of the amount of said debt.*

Dated *August 10th*, 1895.

*William Blackstone*,  
 Judge of the Superior Court.

### Form No. 74.

#### Assignee's Complaint.

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*James Brown*,  
 An Insolvent Debtor. }

To the Honorable the Superior Court of the County of *Los Angeles*.

The undersigned, assignee of the estate of *James Brown*,

an insolvent debtor, complains of *Philip Holding*, and for cause of complaint alleges: That the said *Philip Holding* has, as complainant is informed and believes, in his possession certain silver ware, of the value of one hundred dollars, the property of the estate of said insolvent, which he refuses to deliver to the undersigned, assignee of said estate; and that he also knows of other property of said estate which he conceals.

Wherefore, complainant prays that the said *Philip Holding* may be cited to appear before said court, and may be then examined under oath upon the matters and things herein complained of.

*Peter Verne*, Assignee.

*Abel Counsel*, Attorney for Assignee.

State of California, }  
County of *Los Angeles* } ss.

*Peter Verne*, being duly sworn, says: That he is the assignee of the estate of *James Brown*, an insolvent debtor. That he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon his information or belief, and that as to those matters he believes it to be true.

*Peter Verne*.

Subscribed and sworn to before me, }  
this 20th day of August 1895. }

*Franklin Jordan*,

Notary Public.

### Form No. 75.

#### Order for Examination.

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of }  
*James Brown*, }  
An Insolvent Debtor. }

*Peter Verne*, assignee of the estate of *James Brown*, an

insolvent debtor, having filed his complaint alleging that *Philip Holding* has in his possession certain property in said complaint described, the property of said estate; and has knowledge of other property of said estate,

It is ordered that the said *Philip Holding* appear before this Court in open Court on *Monday* the *30th* day of *August*, 1895, at the court-room of this Court, in the County of *Los Angeles*, at the hour of *ten o'clock A. M.*, or as soon thereafter as the matter can be heard, then and there to be examined under oath touching all the matters and things in said complaint; and to then and there render a full account upon oath of any property of said debtor he may have knowledge or possession of, or which has come into his possession in trust for the said debtor; or which belongs to said estate.

Dated *August 20th*, 1895.

William Blackstone,  
Judge of the Superior Court.

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### Form No. 76.

#### Order to Disclose Property.

In the Superior Court in and for *Los Angeles* County,  
State of California.

In the Matter of }  
James Brown, }  
An Insolvent Debtor. }

It appearing from the examination of *Philip Holding*, had in open Court upon the *30th* day of *August*, 1895, that he has knowledge of certain silverware the property of the estate of said debtor; and also has knowledge of other property belonging to said estate: It is ordered, that the said *Philip Holding* immediately disclose his knowledge thereof to *Peter Verne*, the Assignee of the Estate of *James Brown*, an Insolvent Debtor.

Dated *August 30th*, 1895.

William Blackstone,  
Judge of the Superior Court.

**Form No. 77.****Order of Commitment—Refusing to Appear.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*James Brown,* }  
 An Insolvent Debtor.)

Whereas, upon the *twentieth* day of *August*, 1895, *Peter Verne*, assignee of the estate of *James Brown*, an insolvent debtor, filed his complaint in this court, charging that *Philip Holding* had in his possession property belonging to said estate of the value of one hundred dollars; and had knowledge of other property belonging to said estate, this court, therefore, made its order, directing the said *Philip Holding* to appear before this court, upon a day stated in said order, then and there to be examined under oath touching all the matters and things in said complaint alleged, and herein above set forth. And the said *Philip Holding*, after having been duly cited, refuses to appear and submit to an examination, as aforesaid, or to answer such interrogatories: It is therefore ordered that the said *Philip Holding* be committed to the county jail of the County of *Los Angeles*, State of California, there to remain in close custody until he submit to the said order of court, or is discharged according to law.

Done in open court this *first* day of *September*, 1895.

*William Blackstone,*  
 Judge of the Superior Court.

**Form No. 78.****Order of Commitment—Refusing to Disclose.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*James Brown,* }  
 An Insolvent Debtor.)

Whereas, upon the *twentieth* day of *August* 1895, *Peter Verne*, an assignee of the estate of *James Brown*, an insolvent debtor, filed his complaint in this court, charging that

*Philip Holding* had in his possession certain silverware, the property of said estate, and had knowledge of other property of value belonging to said estate: Whereupon, this court made its order, directing the said *Philip Holding* to appear before this court upon a day stated in said order, then and there to be examined under oath touching all the matters and things in said complaint alleged and herein above set forth, and this court having, on the *twentieth* day of *August*, 1895, made its order, directing the said *Philip Holding* to immediately disclose his knowledge of said matters to *Peter Verne*, the assignee of said insolvent debtor; and it appearing to the court, after full examination of the matter, that the said *Philip Holding* has neglected and refused, and still neglects and refuses, to obey the last aforesaid order: It is therefore ordered, that the said *Philip Holding* be committed to the county jail of the county of *Los Angeles*, State of California, there to remain a prisoner until the said order is complied with, or until he be discharged according to law.

Done in open court this *second* day of *September*, 1895.

*William Blackstone,*

Judge of the Superior Court.

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### Form No. 79.

#### Order on Assignee to Report.

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of        )  
     *James Brown,*        )  
 An Insolvent Debtor.)

Good cause having been shown therefor, upon the petition and motion *Dan Swan* and *Richard Simple*, two creditors of the said estate, *Peter Verne*, the assignee of said estate is hereby ordered to file his report and account herein, on or before the *first* day of *October*, 1895, showing the amount of moneys received and paid out by him as assignee of said estate and also a general report of the condition of the estate, and the probable amount that may be



realized therefrom, up to and including the first day of October, 1895.

William Blackstone,  
Judge of the Superior Court.

Dated September 15, 1895.

**Form No. 80.**  
**Assignee's Report.**

In the Superior Court in and for Los Angeles County, State of California.

In the Matter of  
James Brown,  
An Insolvent Debtor. }

Peter Verne, assignee of the estate of James Brown, an insolvent debtor, herewith exhibits to the Court and the creditors of said estate a just and true account of all his receipts and payments on account of said estate; and a statement of the property of said estate outstanding, with the cause of its outstanding, and a schedule of debts or claims yet undetermined, and a statement of what sum remains in his possession.

Dr. To Cash.		Cr. By Cash.	
From sales of property.....	\$100 00	Paid dividend No. 1.....	\$200 00
Debts collected.....	150 00	Paid expenses as per vouchers on file.....	50 00
	<u>\$250 00</u>		<u>\$250 00</u>

Property Outstanding.	Cause of its Outstanding.	Debts and Claims Outstanding.
Lot 1, block A, in city of Los Angeles described in schedules.	In litigation.	Note on Alex Baz, \$200 00

Peter Verne, Assignee.

Abel Counsel,  
Attorney for Assignee.

State of California, }  
 County of Los Angeles. } ss.

*Peter Verne*, being duly sworn, says: That the foregoing exhibit is just and true to the best of his knowledge and belief.

*Peter Verne*,  
 Assignee of said Estate.

Subscribed and sworn to before me, }  
 this 1st day of October, 1895. }

*Franklin Kester*,

Notary Public.

[For affidavit and notice required by Sec. 34 of Insolvent Act, see forms Nos. 81 and 82.]

### Form No. 81.

#### Final Account of Assignee.

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of }  
*James Brown*, }  
 An Insolvent Debtor. }

Now comes *Peter Verne*, the assignee of the estate of *James Brown*, and insolvent debtor, and files this, the final account of his administration of said estate.

He was appointed assignee on the *twenty-ninth* day of *June*, 1895, and immediately entering upon the discharge of his duties, he received from *James Brown*, as such assignee, all the personal property described in Schedule "A," attached hereto; and also all the real estate described in Schedule "B," attached hereto. That at the dates given in said Schedules "A" and "B," he sold the property therein described, and for the sums therein stated. That *all the property of said estate* has been disposed of. That Schedule "C" is a summary statement of the cash received and expended, and expenses to be paid, with the balance on hand. That Schedule "D" is the list of creditors proving their claims, when proven, with the residence and amounts proven and allowed. That after paying all expenses of administration there will remain on hand \$40.90. That out of the

said sum of \$40.90 each creditor will be entitled to receive five per cent. of the amount due him from the said estate, and no more.

Wherefore, the said assignee prays for an order of this court declaring a dividend of five cents upon each dollar of claims proven as aforesaid, and that upon such payment the said assignee be discharged from his trust. That he makes Schedules "A," "B," "C" and "D," part of this account, and they are herein referred to as such.

*Peter Verne, Assignee.*

*Abel Counsel, Attorney for Assignee.*

#### SCHEDULE A.

Date.	Personal Property Received.	Date of Sale.	Cash Rec'd.
	<i>One horse and carriage.</i>	<i>June 10th, 1895.</i>	<i>\$100.00</i>
	<i>Cash rec'd on note of John Craig.</i>		<i>100.00</i>
	<i>" " debt of Len Taig.</i>		<i>50.00</i>
	<i>" " account of Ole Body.</i>		<i>40.00</i>

#### SCHEDULE B.

Date.	Real Estate Received.	Date of Sale.	Cash Rec'd.
	<i>Lot 1, Block 1, City of Los Angeles.</i>	<i>June 1st, 1895.</i>	<i>\$40.00</i>

#### SCHEDULE C.

Date.	Summary of Cash Received and Expended.	Dr.	Cr.
1880.	<i>From sales and collections,</i>	<i>\$330.00</i>	
	<i>Cash paid out and expended in dividends,</i>		<i>\$200.00</i>
	<i>Cash paid out and expenses of estate,</i>		<i>89.10</i>
	<i>Amount on hand for dividend,</i>		<i>40.90</i>
			<i>\$330.00</i>

#### SCHEDULE D.

When Proven and Allowed.	Name of Creditor.	Residence.	Amount.
<i>Aug. 10, 1895.</i>	<i>Dan Swan.</i>	<i>Los Angeles.</i>	<i>\$318.00</i>
<i>" " "</i>	<i>Richard Simple.</i>	<i>" "</i>	<i>500.00</i>

State of California, }  
County of Los Angeles. } ss.

*Peter Verne*, being duly sworn, deposes and says that he is the assignee of the estate of an insolvent debtor; that he has read the foregoing petition, account, and Schedules "A," "B," "C," and "D," and knows the contents thereof, and that the same are true of his own knowledge, except as to those mat-

ters which are therein stated on his information or belief, and as to those matters, he believes the same to be true.

*Peter Verne.*

Subscribed and sworn to before me, }  
this 30th day of June, 1895. }

*Franklin Kester,*  
Notary Public.

### **Form No. 82.**

#### **Assignee's Notice of Filing Account.**

In the Superior Court in and for *Los Angeles* County,  
State of California.

In the Matter of }  
*James Brown,* }  
An Insolvent Debtor. }

To

You are hereby notified that on the *1st* day of *October*, 1895, the undersigned, assignee of the estate of *James Brown*, an insolvent debtor, filed in the Superior Court of the County of *Los Angeles*, State of California, his *final* account as such assignee; and you are further notified that on the *15th* day of *October*, 1895, in open court, at the court-room of said court, at the hour of *10* o'clock A. M., or as soon thereafter as the matter can be heard, he, the said assignee, will apply to said court for a settlement of his said account, and for a discharge from all liability as such assignee.

Dated *October 1st*, 1895.

*Peter Verne*, Assignee.

*Abel Counsel*, Attorney for Assignee.

### **Form No. 83.**

#### **Affidavit of Assignee.**

In the Superior Court in and for *Los Angeles* County State  
of California.

In the Matter of }  
*James Brown,* }  
An Insolvent Debtor. }

*Peter Verne*, assignee of the estate of *James Brown*, an insolvent debtor, being duly sworn, says: That on the *1st*

day of *October*, 1895, he notified, by mail, all the creditors of the estate who have proved their claims; that on the *1st* day of *October*, 1895, he had filed in the Superior Court of the county of *Los Angeles*, his final account as such assignee, and that he would, on the *4th* day of *September*, 1895, in open court; at the court room of said court, at the hour of *ten o'clock A. M.*, or as soon thereafter as the matter could be heard, apply to said court for a settlement of his said account, and for a discharge from all liability as assignee. The said notices were deposited in the United States post-office at *Los Angeles*, in the county of *Los Angeles*; state of California, enclosed in envelopes, with the postage thereon paid, and were addressed, one to each of the said creditors whose claims have been proved, at their several places of residence.

*Peter Verne,*  
Assignee.

Subscribed and sworn to before me this *1st* day of *October*, 1895.

*Franklin Kester,*  
Notary Public.

*Abel Counsel,* Attorney for Assignee.

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### Form No. 84.

#### Objection to Assignee's Account.

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of        )  
    *James Brown,*        )  
An Insolvent Debtor.    )

*Peter Verne*, the assignee of the estate of *James Brown*, an insolvent debtor, having on the *1st* day of *October*, 1895, filed in this court his *final* account as assignee, the undersigned, a creditor of said estate, hereby excepts to the said account, and contests the same, upon the following grounds: *The said assignee accounts for only \$4000 as secured from Alex. Bailey, whereas he actually secured \$5000 and*

*should account for said sum. Wherefore, the said creditor prays that the said account be not allowed.*

Dated September 8, 1895.

*Richard Simple,  
Creditor.*

*Charles Choate,  
Attorney for said Creditor.*

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**Form No. 85.**

**Order Allowing Assignee's Account.**

In the Superior Court in and for the County of *Los Angeles*  
State of California.

In the Matter of }  
*James Brown,* }  
An Insolvent Debtor.)

*Peter Verne, the assignee of the estate of James Brown, an insolvent debtor, having filed in this court his final account, and due notice of the filing of said account having been given to all the creditors whose claims have been proven, and Richard Simple having filed his objections to said account, and the said account having been examined in open court upon the issues raised by the objections; and evidence having been taken, and the said account having been found correct in every particular, it is ordered that the said account be, and the same is hereby settled and allowed, and the said assignee is ordered to immediately pay to each of the creditors of said estate entitled thereto, in accordance with his said account, a dividend of five per cent. upon the claims proved. And upon compliance with this order, the said assignee shall be discharged from all liability as assignee to any creditor of the said insolvent.*

Dated September 15th, 1895.

*William Blackstone,  
Judge of the Superior Court.*

**Form No. 86.****Affidavit for Examination.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*James Brown,*  
 An Insolvent Debtor. }

*Peter Verne*, being duly sworn, says: That he is assignee of the estate of *James Brown*, an insolvent debtor, which estate is now pending in this Court; that *Frank Fraud* has property of the said insolvent, which he has refused upon demand to deliver to affiant, to wit, certain silverware of the value of \$100.00.

Wherefore, affiant prays that the said *Frank Fraud* may be examined under oath touching the said matter.

*Peter Verne.*

Subscribed and sworn to before me,  
 this eighth day of February, 1895. }

*Franklin Kester*, Notary Public.

*Abel Counsel*, Attorney for the Creditors.

**Form No. 87.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*James Brown,*  
 An Insolvent Debtor. }

On reading the foregoing affidavit, and it satisfactorily appearing to me therefrom that *Frank Fraud* has property which he unjustly refuses to deliver to the Assignee of said estate, the property of said estate, and that it is a proper case for this order, and on application of *Dan Swan*, it is hereby ordered and required, the said *Frank Fraud* personally to be and appear before me in the courtroom of Department four of said Court in the County of *Los Angeles*, on 14th day of February, 1895, at ten o'clock A. M., of that day, to answer concerning said property; and that a copy of

said affidavit and of this order be previously served upon said *Frank Fraud*, at least five days previous to said date.

Dated *February 8th*, 1895.

*William Blackstone,*  
Judge of the Superior Court.

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**Form No. 88.**

**Petition for Order on Assignee.**

In the Superior Court in and for *Los Angeles* County  
State of California.

In the Matter of        )  
    *James Brown*,        )  
An Insolvent Debtor.)

To the Honorable the Superior Court of the County of *Los Angeles*, State of California:

The petition of *Dan Swan* and *Richard Simple* creditors of *James Brown*, an insolvent debtor, respectfully states: That *Peter Verne*, the assignee of the said estate, has refused and neglected, and does still refuse and neglect, to pay to the creditors of the said estate a dividend of 5 cents on each dollar of their claims, as ordered by this Court, on the 15th day of September, A. D., 1895; and when the said order was made the assignee had, and now has, sufficient funds on hand to pay said dividend.

Wherefore, they pray for an order of this Court, directing the said assignee to pay the said dividend to the said creditors on or before the first day of November, 1895, or to show good cause why he refuses to obey the order of this Court, and failing to do which, that he be discharged as assignee.

Dated *October 20th*, 1895.

*Dan Swan,*  
*Richard Simple,*  
Creditors of said Estate.

*Ernest Crafty*, Attorney for Creditors.



**Form No. 89.****Petition for Removal of Assignee.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*James Brown,* } No.  
 An Insolvent Debtor. }

To the Honorable the Superior Court of the County of *Los Angeles*:

The undersigned creditor of *James Brown*, an insolvent debtor, respectfully represents: That *Peter Verne* was on the *10th* day of *June*, 1895, by this court duly appointed assignee of the estate of *James Brown*, an insolvent debtor, and the said assignee duly qualified and took possession of the estate of said insolvent.

That the accounts of said assignee have not been settled and the estate completed. *That on the first day of September, 1895, this court ordered the said assignee to file his account within five days from said first day of September; that more than five days have elapsed, and the said assignee has not filed his account.*

Wherefore, petitioner prays that the said assignee may be removed from his office of assignee, as aforesaid, and another assignee appointed in his stead.

Dated *October 10*, 1895.

*Dan Swan*, Petitioner.

*Ernest Crafty*, Attorney for Petitioner.

**Form No. 90.****Order to Show Cause, etc.**

In the Superior Court, in and for *Los Angeles* County, State of California.

In the Matter of  
*James Brown,* }  
 An Insolvent Debtor. }

Upon reading and filing the petition of *Dan Swan*, one of the creditors of the estate of *James Brown*, an insolvent debtor, praying that *Peter Verne*, assignee of said estate, be

removed, and said petition showing good cause therefor: It is ordered that the said assignee, as aforesaid, show cause, if any he has, before this court, on *Monday*, the *16th* day of *October*, 1895, at the hour of *ten* o'clock, or as soon thereafter as counsel can be heard, why he should not be removed and another assignee appointed in his stead, as prayed for in said petition.

Dated *October 10*, 1895.

*William Blackstone,*  
Judge of the Superior Court.

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### **Form No. 91.**

#### **Order Removing Assignee.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
    *James Brown,*  
An Insolvent Debtor. }

The petition of *Dan Swan*, a creditor of the estate of *James Brown*, an insolvent debtor, coming on this day to be heard, and it appearing that the said assignee has refused to file his account, as ordered by this court: It is ordered that *Peter Verne*, the assignee of said estate, be and he is hereby removed, and *Ira Stevens* is hereby appointed assignee of said estate in his stead, upon his filing a bond within *ten* days to the State of California in the sum of *five hundred* dollars (\$500.00) with *two or more* good sureties, to be approved by this court; and upon the approval of said bond, the said *Peter Verne* is ordered to deliver to the said *Ira Stevens* all the property of said estate in his possession or under his control.

Dated *October 16*, 1895.

*William Blackstone,*  
Judge of the Superior Court.

**Form No. 92.****Resignation of Assignee.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*James Brown,* } No.  
 An Insolvent Debtor.)

To the Honorable the Superior Court in and for the said County of *Los Angeles*:

Having rendered an account of my administration as assignee of the estate of said Insolvent Debtor up to this date, I hereby tender my resignation as such assignee, and ask that the same be accepted and that I be discharged from further duties and liabilities as assignee of said estate.

*Peter Verne,*  
 Assignee.

*October 30th, 1895.*

**Form No. 93.****Final Discharge of Assignee.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
*James Brown,* }  
 An Insolvent Debtor.)

*Peter Verne*, the assignee of the estate of *James Brown*, an insolvent debtor, having proved to the satisfaction of the Court that he has fully complied with the order of this Court, auditing and allowing his *final* account, and declaring a dividend to the creditors of said estate whose claims have been proved, and said estate being fully administered: It is hereby ordered, that the said assignee be, and is hereby discharged from his said office of assignee, as aforesaid, free from all liability as such assignee to any creditor of said insolvent.

Dated *November 20, 1895.*

*William Blackstone,*  
 Judge of the Superior Court.

**Form No. 94.****Petition for Appointment of Receiver.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of  
James Brown,  
An Insolvent Debtor. } No.

To the Honorable the Superior Court in and for said County of *Los Angeles*.

The petition of *Richard Simple* respectfully shows that on the *10th day of June, 1895*, said insolvent debtor filed his voluntary petition in insolvency, and thereupon on the same day this court made an order adjudging said *James Brown* to be an insolvent debtor, and said proceedings are now pending in said court, entitled as herein above set forth; that notice to creditors has been published, and the time for their meeting and election of an assignee of said insolvent's estate set for *June 19th, 1895*; no assignee of said estate has yet been appointed. That petitioner is a creditor of said insolvent debtor in the sum of *\$500*; that he has presented and filed his said claim, which has been allowed by this court, and he has been admitted as a creditor of said estate in said sum of *\$500*. All of which fully appears by the proceedings in said matter. Petitioner further shows and alleges that since the *11th day of May, 1895*, and within 30 days of the filing of his said petition in insolvency, the said *James Brown* conveyed away certain of his property, to wit: *Lot 2 in block A of the Cactus tract, and also placed in pledge to one Philip Holding, certain silverware of the value of about \$100*; that said property constitutes about half the value of said estate; that at the time of said conveyance and pledge, the said *James Brown* contemplated insolvency, and the said *Holding* had reasonable cause to believe that said *Brown* was then insolvent, and that said conveyance and pledge were made for the purpose of hindering, delaying and defrauding the creditors of said *James Brown*, and to impede the operation and evade the provisions of the Insolvent Act of 1895; that said *Holding*, as petitioner is informed and believes, is about to encumber said real estate by mortgage to some innocent person, and is about to dispose of

*said silverware and then depart from this state; and that to prevent the perpetration of such fraud upon the creditors of said insolvent, and to bring said property into said estate to be administered for the benefit of the creditors of said estate it is necessary to commence an action against said Holding for the recovery of said property.*

Wherefore, petitioner prays that this Honorable Court appoint a receiver of the estate of said *James Brown*, and for such other relief as may be meet and proper.

*Charles Choate,*  
Attorney for Petitioner.

State of California, }  
County of *Los Angeles*. } ss.

*Richard Simple*, being duly sworn, deposes and says that he is the petitioner in the foregoing petition; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information or belief, and as to those matters, he believes it to be true.

Subscribed and sworn to before me }  
this *12th* of *June*, 1895. }

*Franklin Kester,*  
Notary Public.

[NOTE.—It has been suggested in notes under section 10 of the Act of 1895, (pp. 80, 81) that section 67 of the Act is not exclusive as to the power of the court to appoint receivers, but that such power may be exercised under the provisions of the Code of Civil Procedure in proper cases; also, that where orders in the nature of injunction against the debtor's management of his property, receiving or making payments, etc., prior to an adjudication, would seem to necessitate the appointment of a receiver, in order that the affairs and property of the debtor might receive proper attention from some one. Especially in involuntary proceedings when, by reason of the necessity of publication of the order to show cause, a long delay may occur before an adjudication can be reached.]

**Form No. 95.****Bond of Petitioning Creditor.**

In the Superior Court in and for *Los Angeles* County,  
State of California.

In the Matter of }  
    *James Brown*, } No.  
An Insolvent Debtor. }

State of California, }  
County of *Los Angeles*. } ss.

Know all men by these presents: That we, *Richard Simple*, as principal, and *Caesar Minas*, and *Cyrus Croesus*, as sureties, are held and bound unto *James Brown*, said insolvent debtor, in the sum of \$1000, for the payment of which we jointly and severally bind ourselves, our heirs, executors and administrators by these presents.

Signed and sealed this *12th* day of *June*, 1895.

The conditions of the above bond are such that whereas, the said *Richard Simple*, as a creditor of the estate of said insolvent debtor, has filed his petition in said court asking that a Receiver for said insolvent estate be appointed by the court: Now, if the said *Richard Simple* shall pay to the said *James Brown* all damages he may sustain by reason of the appointment of such receiver, and the entry by him upon his duties, in case the said *Richard Simple* shall have procured such appointment wrongfully, maliciously, or without sufficient cause, then this bond to be void, otherwise to remain of force.

Witness our hands and seals the day and year above written.

*Richard Simple*. [SEAL.]

*Caesar Minas*. [SEAL.]

*Cyrus Croesus*. [SEAL.]

Signed and sealed in the presence of

*Wake Watchman*.

State of California, }  
County of *Los Angeles*. } ss.

*Caesar Minas*, and *Cyrus Croesus*, sureties in the foregoing bond, being duly sworn, each for himself, says that he is a *freeholder* in said County of *Los Angeles*, and is worth the sum specified in the foregoing bond, over and

above all his just debts and liabilities, exclusive of property exempt from execution.

*Caesar Minas,* [SEAL.]

*Cyrus Croesus,* [SEAL.]

Subscribed and sworn to before me }  
this 12th day of June, 1895. }

*Franklin Kester,*

Notary Public.

### Form No. 96.

#### Order Appointing Receiver.

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of }  
*James Brown,* } No.  
An Insolvent Debtor. }

*Richard Simple*, a creditor of *James Brown*, an insolvent debtor, having filed his verified petition in the above entitled matter, and having given an undertaking to said *James Brown* as required by the order of this Court, in the sum of \$1000; and it appearing to the Court from the allegation in said petition, that it is a proper case for a receiver to be appointed,

It is ordered, that *Samuel Pratt* be and he is hereby appointed receiver of all the estate of *James Brown*, said insolvent debtor, with all the powers and duties as such, as given and required by law in such cases, and that before entering upon his duties, he take the oath and execute an undertaking to said *James Brown* in the sum of \$2000; conditioned as required by section 567 of the Code of Civil Procedure.

Dated *June 12th*, 1895.

*William Blackstone,*

Judge of the Superior Court.

**Form No. 97.****Bond of Receiver.**

In the Superior Court, in and for *Los Angeles* County, State of California.

In the Matter of }  
*James Brown,* }  
 An Insolvent Debtor. }

State of California, }  
 County of *Los Angeles.* } ss.

Know all men by these presents, that we *Samuel Pratt* as principal, and *Samuel Ford* and *Henry Hanks* as sureties, are held and firmly bound unto *James Brown*, said insolvent debtor in the sum of *two thousand* dollars, lawful money of the United States of America, for the payment whereof well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, by these presents.

Signed and sealed, and dated this *15th* day of *June*, A. D. 1895.

The condition of the above obligation is such, that whereas, by an order of said Superior Court, *Department No. 5*, in the above entitled proceeding, duly made and entered on the *15th* day of *June* A. D. 1895, the said *Samuel Pratt* was duly appointed receiver of the property and estate of said insolvent debtor.

Now, if the said *Samuel Pratt* shall faithfully discharge the duties devolved upon him as such receiver and obey the orders of the Court therein, then the above obligation to be void; otherwise to remain in full force.

*Samuel Pratt,* [SEAL.]

*Samuel Ford,* [SEAL.]

*Henry Hanks,* [SEAL.]

State of California, }  
 County of *Los Angeles.* } ss.

*Samuel Ford* and *Henry Hanks* the above named sureties being duly sworn, each for himself, says that he is a freeholder within the County of *Los Angeles*, State of California, and is worth the sum specified in the foregoing undertaking



over and above all of his just debts and liabilities exclusive of property exempt from execution.

*Samuel Ford.*

*Henry Hanks.*

Subscribed and sworn to before me }  
this 15th day of June, 1895. }

*Franklin Kester,*

Notary Public.

#### APPROVAL OF BOND.

[To be Written on the Bond.]

The foregoing bond of *Samuel Pratt* as receiver of the estate of *James Brown* being presented, the same is hereby approved, and ordered filed.

This 15th day of June, 1895.

*William Blackstone,*

Judge of the Superior Court.

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### Form No. 98.

#### Oath of Receiver.

In the Superior Court in and for *Los Angeles* County,  
State of California.

In the Matter of }  
*James Brown,* } No.  
An Insolvent Debtor. }

State of California, }  
County of *Los Angeles.* } ss.

I, *Samuel Pratt*, do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of California, and that I will faithfully perform the duties of receiver of the estate of *James Brown*, an insolvent debtor, and will obey the orders of the court in the matter of said insolvency.

*Samuel Pratt.*

Subscribed and sworn to before me }  
this 15th day of June, 1895. }

*T. E. Newlin,* Clerk.

By *Conrad Haynes*, Deputy.

**Form No. 99.****Petition for Sale of Property.**

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of )  
    *James Brown,* )  
An Insolvent Debtor.)

To the Honorable the Superior Court in and for the County of *Los Angeles*, State of California:

The petition of *Samuel Pratt* respectfully shows:

That petitioner was on the *12th* day of *June*, 1895, by an order of the above court duly appointed receiver of the estate of the above insolvent and that petitioner duly qualified as such receiver on the *15th* day of *June*, 1895, has ever since been and is now, the duly appointed, qualified and acting receiver of said estate.

That as such receiver, he has taken possession of all of the estate described in the petition, schedule, and inventory of said insolvent, and of all the property of said insolvent debtor.

That said estate consists largely of *butter, eggs, fresh meats and vegetables, horses, sheep, loose hay.*

That said property is now being kept at considerable expense, and produces no revenue whatsoever, and is rapidly deteriorating in value, much of said property being of a perishable nature, and bulky and expensive to store or keep, being of a character of property which is easily damaged by non-use and a want of proper care and attention. That the expense of storing and keeping said property is disproportionate to any benefit derived therefrom, and is disproportionate to the value of said property, and that said property is in danger of being lost, removed, and materially injured, and that said stock and property will soon have to be sold; that it is not of sufficient value to keep, in view of the expenses of storage, rent, insurance and handling until the election of an assignee. That said insolvency proceedings above entitled are now pending in this court, and that the election of an assignee has not taken place. That it is for the best interest of said estate that all of the property

of said estate be sold forthwith because of the foregoing reasons.

Wherefore, your petitioner prays that this honorable court make an order authorizing and directing your petitioner, as such receiver, to sell said property, and the whole and every part of the property of said insolvent at public auction, and that said sale be made under the direction of your petitioner as such receiver; and for such other and further order as may be meet in the premises.

Dated *June 17th*, 1895.

*Samuel Pratt, Receiver,*  
Petitioner.

[NOTE. Notice of the application should be given where a private sale is contemplated. See Sec. 29 of Act of 1895, and see Form No. 69.]

State of California, }  
County of *Los Angeles*. } ss.

*Samuel Pratt* being duly sworn, deposes and says, that he is the duly appointed, qualified, and acting receiver of the estate of the above insolvent debtor. That he has heard read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief; and as to those matters that he believes it to be true.

*Samuel Pratt.*

Subscribed and sworn to before me }  
this *17th* day of *June*, 1895. }

*T. H. Ward*, County Clerk.

By *A. W. Seaver*, Deputy.

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### Form No. 100.

#### Order Directing Sale of Property.

In the Superior Court in and for *Los Angeles* County, State of California.

In the Matter of }  
*James Brown*, } No.  
An Insolvent Debtor. }

Upon reading and filing the petition of *Samuel Pratt*, the receiver of the estate of the above insolvent, praying for an order for the sale of all of the property of said estate, and it

appearing to the court that said property is now being kept and retained at considerable expense to said estate; that it produces no income or revenue, is of a perishable nature, is liable to and is rapidly deteriorating in value, and is disproportionately expensive to keep, and that it is for the best interest of said estate that said property should be sold as prayed for in said petition,

It is ordered that said *Samuel Pratt* as receiver of said estate, be and he is hereby authorized and directed to sell the whole of said property and all of the property of said estate at public auction upon five days' notice of said sale, to be given by publication in the *Daily Herald* a newspaper of general circulation published in the city of *Los Angeles* and county of *Los Angeles*, and that said sales be made for cash, in gold coin of the United States.

Dated *June 18th*, 1895.

*William Blackstone*,  
Judge of the Superior Court.

## INSOLVENT ACT OF 1880.

*An Act for the relief of insolvent debtors, for the protection of creditors and for the punishment of fraudulent debtors.*

[Approved April 16, 1880. Stats. p. 316.]

### ARTICLE I.—GENERAL SUBJECT OF THE ACT.

SECTION 1. Every insolvent debtor may, upon compliance with the provisions of this act, be discharged from his debts and liabilities. This act shall be known and may be cited as the Insolvent Act of eighteen hundred and eighty.

### ARTICLE II.—VOLUNTARY INSOLVENCY.

SECTION 2. An insolvent debtor owing debts exceeding in amount the sum of three hundred dollars may apply by petition to the Superior Court of the county, or city and county, in which he has resided for six months next preceding the filing of his petition, to be discharged from his debts and liabilities. In his petition he shall set forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain a discharge from his debts and liabilities, and shall annex thereto a schedule and inventory, and valuation, in compliance with the provisions of this act. The filing of such petition shall be an act of insolvency, and thereupon such petitioner shall be adjudged an insolvent debtor.

SECTION 3. Said schedule must contain a full and true statement of all his debts and liabilities, exhibiting to the best of his knowledge and belief to whom said debts or liabilities are due, the place of residence of his creditors, and the sum due to each; the nature of the indebtedness or demand, whether founded on written security, obligation, contract, or otherwise; the true cause and consideration thereof, and the time and place when and where said indebtedness accrued, and a statement of any existing pledge, lien, mortgage, judgment, or other security for the payment of the same.

SECTION 4. Said inventory must contain an accurate description of all the estate, both real and personal, of the petitioner

including his homestead, if any, and all property exempt by law from execution, and where the same is situated, and all incumbrances thereon.

SECTION 5. The petition, schedule, and inventory must be verified by the affidavit of the petitioner, annexed thereto, and shall be in form substantially as follows: I, . . . , do solemnly swear that the schedule and inventory now delivered by me contain a full, perfect, and true discovery of all the estate, real, personal and mixed, goods and effects, to me in any way belonging; all such debts as are to me owing, or to any person or persons in trust for me, and all securities and contracts, and contracts whereby any money may hereafter become payable, or any benefit or advantage accrue to me or to my use, or to any other person or persons in trust for me; that I have no lands, money, stock, or estate, reversion or expectancy, besides that set forth in my schedule and inventory; that I have in no instance created or acknowledged a debt for a greater sum than I honestly and truly owe; that I have not, directly or indirectly, sold, or otherwise disposed of, or concealed, any part of my property, effects, or contracts; that I have not in any way compounded with my creditors whereby to secure the same, or to receive, or to expect, any profit or advantage therefrom, or to defraud or deceive any creditor to whom I am indebted in any manner. So help me God.

SECTION 6. Upon receiving and filing such petition, schedule, and inventory, the court shall make an order declaring the petitioner insolvent, and appointing the sheriff of the county, or city and county, where said petition is filed, a receiver, to take charge and possession of all of the estate, real and personal, of the debtor, except such as may be by law exempt from execution, and of all his deeds, vouchers, books of account, and papers, and to keep and care for and dispose of the same until the appointment of an assignee; and thereupon and after such appointment, the oath, undertaking, and powers of such receiver shall, in all respects, be regulated by the general laws of the state applicable to receivers. Said order shall further forbid the payment of any debts, and the delivery of any property belonging to such debtor to him, or for his use, and the transfer of any property by him; and shall further appoint a time and place for the meeting of the creditors to prove their debts and choose one or more assignees of the estate which shall not be less than thirty days after the making of said order, and shall designate a newspaper or newspapers of general circulation in which publication thereof shall be made. Upon the granting of said order, all proceedings against the said insolvent shall be stayed. [*In effect April 6, 1881. Statutes 1891, p. 511.*]

[ORIGINAL SECTION.]

SECTION 6. Upon receiving and filing such petition, schedule and inventory, the court shall make an order declaring the petitioner insolvent, and directing the sheriff of the county to take possession of all the estate, real and personal, of the debtor, except such as may be by law exempt from

execution, and of all his deeds, vouchers, books of account, and papers, and to keep the same safely until the appointment of an assignee. Said order shall further forbid the payment of any debts and the delivery of any property belonging to such debtor, to him or for his use, and the transfer of any property by him; and shall further appoint a time and place for a meeting of the creditors, to prove their debts and choose one or more assignees of the estate, which shall not be less than thirty days after the making of said order, and shall designate a newspaper or newspapers of general circulation in which publication thereof shall be made. Upon the granting of said order, all proceedings against the said insolvent shall be stayed.

SECTION 7. A copy of said order shall immediately be published by the clerk of said court in the newspaper or newspapers designated therein, as often as the newspaper is printed before the meeting of creditors, and be served by the clerk forthwith by United States mail, postage prepaid, or personally, on all creditors named in the schedule. The order of adjudication shall direct the publication thereof in a newspaper published in the county or city and county, in which the petition is filed, if there be one, and if there be none, in a newspaper published nearest to such county, or city and county; *provided*, that no order of adjudication upon creditors' petition shall be entered unless there first be deposited with the clerk, in addition to the usual cost of commencing said proceedings, a sum of money sufficient to defray the cost of the publication ordered by the court, and ten cents for each copy to be mailed to or served on the creditors, which latter sum is hereby constituted the legal fee of the clerk for the mailing or service required in this section.

### ARTICLE III.—INVOLUNTARY INSOLVENCY.

SECTION 8. An adjudication of insolvency may be made on the petition of five or more creditors, residents of this state, whose debts or demands accrued in this state, and amount in the aggregate to not less than five hundred dollars; *provided*, that said creditors, or either of them, have not become creditors by assignment within thirty days prior to the filing of said petition. Such petition must be filed in the Superior Court of the county, or city and county, in which the debtor resides or has his place of business, and must be verified by at least three of the petitioners, setting forth that such person is about to depart from the state with intent to defraud his creditors; or being absent from the state with such intent, remains absent; or conceals himself to avoid the service of legal process; or conceals, or is removing, any of his property, to avoid its being attached or taken on legal process; or being insolvent, has suffered his property to remain under attachment or legal process for four days; or has confessed, or offered to allow judgment in favor of any creditors; or willfully suffered judgment to be taken against him by default; or has suffered or procured his property to be taken on legal process, with intent to give a preference to one or more of his creditors; or has made any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, with intent to delay, defraud, or hinder his creditors; or in contemplation of

insolvency has made any payment, gift, grant, sale, conveyance, or transfer of his estate, property, rights, or credits; or has been arrested and held in custody by virtue of any civil process of court founded on any debt or demand, and such process remains in force and not discharged by payment, or otherwise, for a period of four days; or being a merchant or tradesman, has stopped or suspended, and not resumed payment within a period of forty days after maturity of any written acknowledgment of indebtedness, unless the party holding such acknowledgment has, in writing, waived the right to proceed under this subdivision; or being a bank, or banker, agent, broker, factor, or commission merchant, has failed for forty days to pay any moneys deposited with or received by him in a fiduciary capacity, upon demand of payment, excepting savings and loan banks, or associations who loan the money of their stockholders and depositors on real estate, and provide in their by-laws for the repayment of such deposits. The petitioners may, from time to time, amend and correct the petition, so that the same shall conform to the facts, by leave of the court before which the proceedings are pending, but nothing in this section shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith upon a security taken in good faith on the occasion of the making of such loan; the said petition shall be accompanied by a bond with two sureties in the penal sum of at least five hundred dollars, conditioned that if the debtor should not be declared an insolvent the petitioners will pay all costs and damages, including a reasonable attorney's fee, that the debtor may sustain by reason of the filing of said petition. The court may, upon motion, direct the filing of an additional bond with different sureties when deemed necessary.

SECTION 9. Upon the filing of such creditors' petition, the court shall issue an order requiring such debtor to show cause, at a time and place to be fixed by said court, why he should not be adjudged an insolvent debtor, and at the same time, or thereafter, upon good cause shown therefor, said court may make an order forbidding the payment of any debts, and the delivery of any property belonging to such debtor to him or for his use, or the transfer of any property by him.

SECTION 10. A copy of said petition, with a copy of the order to show cause, shall be served on the debtor, in the same manner as is provided by law for the service of summons in civil actions, but such service shall be made at least ten days before the time fixed for the hearing; *provided*, that if, for any reason, the service is not made, the order may be renewed, and the time and place of hearing changed, or by a supplemental order by the court, or if such debtor cannot be found, or his place of abode ascertained, service shall be made by publication, as is provided in the Code of Civil Procedure for service of summons by publication.



SECTION 11. At the time fixed for the hearing of said order to show cause, or such other time as it may be adjourned to, the debtor may demur to the petition for the same causes as is provided for demurrer in other cases by the Code of Civil Procedure. If the demurrer be overruled, the debtor shall have ten days thereafter in which to answer the petition. If the debtor answers the petition, such answer shall contain a specific denial of the material allegations of the petition controverted by him, and shall be verified in the same manner as pleadings in civil actions; and the issues raised thereon may be tried with or without a jury, according to the practice provided by law for the trial of civil actions.

SECTION 12. If the respondent shall make default, or if, after a trial, the issues are found in favor of the petitioners, the court shall make an order adjudging that said respondent is, and was at the time of filing the petition, an insolvent debtor, and shall require said debtor, within such time as the court may designate, to file in court the schedule and inventory provided for in sections three and four of this act; and thereupon all proceedings shall be had in said matter in the same manner as if said debtor had voluntarily filed his petition.

SECTION 13. If upon such hearing or trial the issues are found in favor of the respondent, the proceedings shall be dismissed, and the respondent shall recover costs from the petitioning creditors in the same manner as on final judgment in civil actions.

SECTION 14. If the debtor has failed to appear after service; personally or by publication, or is absent, or cannot be found, the schedule and inventory may be prepared by the sheriff, or by the assignee, from the best information he can obtain.

#### ARTICLE IV.—ASSIGNEES.

SECTION 15. At a meeting of the creditors, in open court, those having proven their claims, by filing a verified statement showing the amount, nature, and security, if any, shall proceed to the election of one assignee. The assignee shall be a resident of the county where the insolvent resides, or where he has carried on his business. In electing an assignee, the opinion of the majority in amount of claims shall prevail. The clerk of the court shall keep a minute of the deliberations of said creditors, and of the election and appointment of an assignee, and enter the same upon the records of the court. The assignee shall file, within five days, unless the time be extended by the court, with the clerk, a bond, in an amount to be fixed by the court, to the state of California, with two or more sufficient sureties, approved by the court, and conditioned for the faithful performance of the duties devolving upon him. The bond shall not be void upon the first recovery, but may be sued upon from time to time by any creditor aggrieved, in his own name, until the whole penalty is ex-

hausted. The sureties on such bond may be required to justify, upon the application of any party interested, in the same manner as bail upon arrest in civil cases.

SECTION 16. If on the day appointed for the meeting the creditors do not attend, or refuse to elect an assignee, or if after election the assignee shall fail to qualify within the proper time, it shall be lawful for the court before which the said meeting may take place to appoint an assignee and fix the amount of his bond.

SECTION 17. As soon as the assignee is appointed and qualified, the clerk of the court shall, by an instrument under his hand and seal of the court, assign and convey to the assignee all the estate, real and personal, of the debtor, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in insolvency, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process, as the property of the debtor, and shall dissolve any attachment made within one month next preceding the commencement of the insolvency proceedings. Such assignment shall operate to vest in the assignee all the estate of the insolvent debtor not exempt by law from execution.

SECTION 18. The assignee shall have the right to recover all the estate, debts, and effects of said insolvent. If at the time of the commencement of proceedings in insolvency an action is pending in the name of the debtor, for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall be allowed and admitted to prosecute the action, in like manner and with like effect as if it had been originally commenced by him. In suits prosecuted by the assignee, a certified copy of the assignment made to him shall be conclusive evidence of his authority to sue.

SECTION 19. The assignee shall, within one month after the making of the assignment to him, cause the same to be recorded in every county, or city and county, within this state, where any lands owned by the debtor are situated, and the record of such assignment, or a duly certified copy thereof, shall be conclusive evidence thereof in all courts.

SECTION 20. Any assignee may at any time, by writing filed in court, resign his appointment, having first settled his accounts, and delivered up all the estate to such successor as the court shall appoint; *provided*, that if, in the discretion of the court, the circumstances of the case require it, upon good cause being shown, the court may at any time before such settlement of account and delivery of the estate shall have been completed, revoke the appointment of such assignee, and appoint another in his stead. The liability of the outgoing assignee, or of the sureties on his

bond, shall not be in any manner discharged, released or affected by such appointment of another in his stead.

SECTION 21. The said assignee shall have power:

1. To sue in his own name and recover all the estate, debts, and things in action, belonging or due to such debtor, and no set-off or counter-claim shall be allowed in any such suit, for any debt, unless it was owing to such creditor by such debtor at the time of the adjudication of insolvency;

2. To take into his possession all the estate of such debtor, except property exempt by law from execution, whether attached or delivered to him or afterwards discovered, and all books, vouchers, evidence of indebtedness, and securities belonging to the same;

3. In case of a non-resident, absconding, or concealed debtor, to demand and receive of every sheriff who shall have attached any of the property of such debtor, or who shall have in his possession any moneys arising from the sale of such property, all such property and moneys, on paying him his lawful costs and charges for attaching and keeping the same;

4. From time to time to sell at public auction all the estate, real and personal, vested in him as such assignee, which shall come to his possession, and as ordered by the court;

5. On such sales to execute the necessary conveyances and bills of sale;

6. To redeem all valid mortgages and conditional contracts, and all valid pledges of personal property, and to satisfy any judgments which may be an incumbrance on any property sold by him, or to sell such property subject to such mortgage, contracts, pledges, or judgments;

7. To settle all matters and accounts between such debtor and his debtors, subject to the approval of the court;

8. Under the order of the court appointing him, to compound with any person indebted to such debtor, and thereupon to discharge all demands against such person;

9. To have and recover from any person receiving a conveyance, gift, transfer, payment, or assignment, made contrary to any provision of this act, the property thereby transferred or assigned, or in case a re-delivery of the property cannot be had, to recover the value thereof, with damages for the detention.

SECTION 22. The insolvent shall, either before or on the day appointed for the meeting of creditors, deliver to the court all the commercial or account books he may have kept, which books shall be deposited in the clerk's office of said court. Said insolvent shall also deliver to the court, at the same time, all vouchers, notes, bonds, bills, securities, or other evidences of debt, in any manner relating to or having any bearing upon or connection with the property surrendered by said debtor, and all such papers or securities shall be deposited in the clerk's office of said court, and the clerk shall hand them over, together with the books of the insolvent, to the assignee who may be appointed.

SECTION 23. If any person, before the assignment is made, having notice of the commencement of proceedings in insolvency, embezzles or disposes of any of the moneys, goods, chattels, or effects of the insolvent, he is chargeable therewith, and liable to an action by the assignee for double the value of the property so embezzled or disposed of, to be recovered for the benefit of the estate.

SECTION 24. The same penalties, forfeitures, and proceedings by citation, examination, and commitment shall apply on behalf of an assignee against persons suspected of having concealed, embezzled, conveyed away, or disposed of any property of the debtor, or of having possession or knowledge of any deeds, conveyances, bonds, contracts, or other writings which relate to any interest of the debtor in any real or personal estate, as provided in the case of the estates of deceased persons in sections fourteen hundred and fifty-nine, fourteen hundred and sixty, and fourteen hundred and sixty-one of the Code of Civil Procedure.

SECTION 25. The assignee shall, as speedily as possible, convert the estate, real and personal, into money. He shall keep a regular account of all moneys received by him as assignee, to which every creditor or other person interested therein may, at all reasonable times, have access. No private sale of any property of the estate of an insolvent debtor shall be valid unless made under the order of the court upon a petition in writing, which shall set forth the facts showing the sale to be necessary. Upon filing the petition, notice of at least ten days shall be given by publication and mailing, in the same manner as is provided in section seven of this act. If it appears that a private sale is for the best interests of the estate, the court shall order it to be made.

SECTION 26. When it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or is liable to deteriorate in value, or is disproportionately expensive to keep, the court may order the same to be sold in such manner as may be deemed most expedient, under the direction of the sheriff or assignee, as the case may be, who shall hold the funds received in place of the property sold until the further order of the court.

SECTION 27. Outstanding debts, or other property due or belonging to the estate, which cannot be collected and received by the assignee without unreasonable or inconvenient delay or expense, may be sold and assigned in like manner as the remainder of the estate.

SECTION 28. Assignees shall be allowed all necessary expenses in the care, management, and settlement of the estate, and shall collectively be entitled to charge and receive for their services commissions upon all sums of money coming to their hands and accounted for by them, as follows: For the first thousand dollars, at the rate of seven per cent.; for all above that sum and not

exceeding ten thousand dollars, at the rate of five per cent.; and for all above that sum, at the rate of four per cent.

SECTION 29. At the expiration of three months from the appointment of the assignee in any case, or as much earlier as the court may direct, the assignee shall exhibit to the court and to the creditors, and file just and true accounts of all his receipts and payments, verified by his oath, and a statement of the property outstanding, specifying the cause of its outstanding; also what debts or claims are yet undetermined, and stating what sum remains in his possession; and thereupon a dividend shall be made, unless for cause the court shall otherwise order. Thereafter, further accounts, statements, and dividends shall be made in like manner as often as occasion requires.

SECTION 30. The court shall at any time, upon the motion of any two or more creditors, require the assignee to file his account, and if he has funds subject to distribution, he shall be required to distribute them without delay.

SECTION 31. All creditors whose debts are duly proved and allowed shall be entitled to share in the property and estate pro rata, without priority or preference whatever, other than as provided in this act, and in section twelve hundred and four of the Code of Civil Procedure; *provided*, that any debt proved by any person liable as bail, surety, guarantor, or otherwise, for the debtor, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable; and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct.

SECTION 32. No dividend already declared shall be distributed [disturbed] by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors, before any further dividend is made to the latter; *provided*, the failure to prove such claim shall not have resulted from his own neglect.

SECTION 33. Should the assignee refuse or neglect to render his accounts as required by sections thirty and thirty-one, or pay over a dividend when he shall have, in the opinion of the court, sufficient funds for that purpose, the court shall immediately discharge such assignee from his trust, and shall have power to appoint another in his place. The assignee so discharged shall forthwith deliver over to the assignee appointed by the court all the funds, property, books, vouchers, or securities belonging to the insolvent, without charging or retaining any commission or compensation for his personal services.

SECTION 34. Preparatory to the final account and dividend, the assignee shall submit his account to the court, and file the

same, and shall at the time of filing, accompany the same with an affidavit that notice by mail has been given to all creditors who have proved their claims; that he will apply for a settlement of his account, and for a discharge from all liability as assignee at a time specified in such notice, which time shall be not less than ten or more than twenty days from such filing. At the hearing the court shall audit the account, and any person interested may appear and file exceptions in writing and contest the same. The court thereupon shall settle the account and order a dividend of any portion of the estate remaining undistributed, and shall discharge the assignee, subject to compliance with the order of the court, from all liability as assignee to any creditor of the insolvent.

#### ARTICLE V.—PARTNERSHIPS AND CORPORATIONS.

SECTION 35. Two or more persons who are partners in business may be adjudged insolvent, either on the petition of such partners, or any one of them, or on the petition of five or more creditors of the partnership, in which case an order shall be issued in the manner provided by this act, upon which all the joint stock and property of the partnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as may be exempt by law, and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignee shall be chosen by the creditors of the copartnership, and shall also keep separate accounts of the joint stock or property of the copartnership, and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignee the whole amount of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock after the payment of the joint debts, such balance shall be divided and appropriated to and among the separate estate of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any insolvency; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts, and the certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been by or against him alone under this act; and in all other respects the proceedings as to partners shall be conducted in the like manner as if they had been commenced and prosecuted by or against one person alone. If such copartners reside in different counties, that court in which the petition is first filed shall retain exclusive jurisdiction over the case. If the petition be filed by less than all the partners of a

copartnership, those partners who do not join in the petition shall be ordered to show cause why they should not be adjudged to be insolvent in the same manner as other debtors are required to show cause upon a creditor's petition, as in this act provided.

SECTION 36. The provisions of this act shall apply to corporations, and upon the petition of any officer of any corporation duly authorized by the vote of the board of directors or trustees, at a meeting specially called for that purpose, or by the assent in writing of a majority of the directors or trustees, as the case may be, or upon a creditor's petition made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors. All the provisions of this act which apply to the debtor, or set forth his duties, examination and liabilities, or prescribe penalties, or relate to fraudulent conveyances, payments and assignments, apply to each and every officer of any corporation in relation to the same matters concerning the corporation. Whenever any corporation is declared insolvent, all its property and assets shall be distributed to the creditors; but no discharge shall be granted to any corporation.

#### ARTICLE VI.—PROOF OF DEBTS.

SECTION 37. All debts due and payable from the debtor at the time of the adjudication of insolvency, and all debts then existing but not payable until a future time, a rebate of interest being made, when no interest is payable by the terms of the contract, may be proved against the estate of the debtor.

SECTION 38. All demands against the debtor for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts, to the amount of the value of the property so withheld, from the time of the conversion.

SECTION 39. If the debtor shall be bound as indorser, surety, bail or guarantor, upon any bill, bond, note, or other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until the adjudication of insolvency, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared.

SECTION 40. In all cases of contingent debts, and contingent liabilities contracted by the debtor and not herein otherwise provided for, the creditor may make claim therefor and have his claim allowed, with the right to share in the dividends if the contingency shall happen before the order for the final dividend, or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall be done in such manner as the court shall order, and shall be allowed to prove for the amount so ascertained.

SECTION 41. Any person liable as bail, surety, or guarantor, or otherwise, for the debtor who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor, if he shall have proved the same, although such payments shall have been made after the proceedings in insolvency were commenced; and any person so liable for the debtor, and who has not paid the whole of said debt, but is still liable for the same, or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same in the name of the creditor.

SECTION 42. Where the debtor is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove, for a proportionate part thereof up to the time of the insolvency, as if the same became due from day to day, and not at such fixed and stated periods.

SECTION 43. In all cases of mutual debts and mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed and paid. But no set-off or counter-claim shall be allowed of a claim in its nature not provable against the estate; *provided*, that no set-off or counter-claim shall be allowed in favor of any debtor to the insolvent of a claim purchased by or transferred to him after the filing of the petition by or against him, for the purpose of making such set-off or counter-claim.

SECTION 44. When a creditor has a mortgage or pledge of real or personal property of the debtor, or a lien thereon, for securing the payment of a debt, owing to him from the debtor, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee, upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the debtor's right of redemption thereon on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon, and in either case the assignee and creditor respectively shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not sold or released, and delivered up, the creditor shall not be allowed to prove any part of his debt.

SECTION 45. No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the debtor, but shall be deemed to have waived all right of action and suit against him, and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby; *provided*, that no valid



lien existing in good faith thereunder shall be thereby affected; *and further provided*, that a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the debtor where a discharge has been refused or the proceedings have determined without a discharge. And no creditor whose debt is provable, under this act shall be allowed, after the commencement of proceedings in insolvency, to prosecute to final judgment any action therefor against the debtor until the question of the debtor's discharge shall have been determined, and any such suit or proceeding shall, upon the application of the debtor, or any creditor, or of the assignee, be stayed to await the determination of the court in insolvency on the question of discharge; *provided*, there be no unreasonable delay on the part of the debtor, or of the petitioning creditors, as the case may be, in prosecuting the case to its conclusion; *and provided also*, that if the amount due the creditor is in dispute, the suit, by leave of the court in insolvency, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proven in insolvency, but execution shall be stayed as aforesaid; *provided further*, that where a valid lien or attachment has been acquired or secured in any such action and an undertaking been offered and accepted in lieu of such lien or attachment, the case may be prosecuted to final judgment for the purpose of fixing the liability of the sureties upon such undertaking; but execution against the insolvent upon such judgment shall be stayed.

SECTION 46. Any person who shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim, on account of which the preference was made or given; nor shall he receive any dividend thereon until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference.

SECTION 47. The court may, upon the application of the assignee, or of any creditor of the debtor, or without any application, before or after adjudication in insolvency, examine upon oath the debtor in relation to his property and his estate, and any person tendering or making proof of claims, and may subpoena witnesses to give evidence relating to such matters. All examinations of witnesses shall be had and depositions shall be taken in accordance with and in the same manner as is provided by the Code of Civil Procedure.

#### ARTICLE VII.—DISCHARGE.

SECTION 48. At any time after the expiration of three months from the adjudication of insolvency, the debtor may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given to all creditors who have proved their debts to appear, on a day appointed for that purpose, and

show cause why a discharge should not be granted to the debtor; said notice shall be given by mail, and by publication at least once a week, for four weeks, in a newspaper published in the county, or if there be none, in a newspaper published nearest such county; *provided*, that if no debts have been proven, such notice shall not be required.

SECTION 49. No discharge shall be granted, or if granted shall be valid, if the debtor shall have sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in insolvency, in relation to any material fact concerning his estate, or his debts, or to any other material fact; or if he has concealed any part of his estate, or effects, or any books or writings relating thereto; or if he has been guilty of fraud or willful neglect in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this act; or if he has caused or permitted any loss or destruction thereof; or if, within one month before the commencement of such proceedings, he has procured his lands, goods, money or chattels to be attached, or seized on execution; or if he has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document with intent to defraud his creditors; or if he has given any fraudulent preference contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate, or if, having knowledge that any person has proven such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge; or if, being a merchant or tradesman, he has not, subsequently to the passage of this act, kept proper books of account; or if he or any other person on his account, or in his behalf, has influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation; or if he has, in contemplation of becoming insolvent, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts; or if he has been convicted of any misdemeanor under this act, or has been guilty of fraud contrary to the true intent of this act; or in case of voluntary insolvency has received the benefits of this or any other act of insolvency or bankruptcy within three years next preceding his application for discharge. And before any discharge is granted, the debtor shall take and subscribe an oath to the effect that he has not done,

suffered, or been privy to any act, matter or thing specified in this act, as ground for withholding such discharge or as invalidating such discharge, if granted.

SECTION 50. Any creditor opposing the discharge of a debtor shall file specifications, in writing, of the grounds of his opposition, and after the debtor has filed and served his answer thereto, which pleadings shall be verified, the court shall try the issue or issues raised, with or without a jury, according to the practice provided by law in civil actions.

SECTION 51. If it shall appear to the court that the debtor has in all things conformed to his duty under this act, and that he is entitled under the provisions thereof to receive a discharge, the court shall grant him a discharge from all his debts, except as hereinafter provided, and shall give him a certificate thereof, under the seal of the court, in substance as follows: In the Superior Court of the county of—, state of California. Whereas, — has been duly adjudged an insolvent under the insolvent laws of this state, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said— be forever discharged from all debts and claims, which by said insolvent laws are made provable against his estate, and which existed on the— day of—, on which the petition for adjudication was filed by (or against) him, excepting such debts, if any, as are by said insolvent laws excepted from the operation of a discharge in insolvency. Given under my hand, and the seal of the court, this— day of—, A. D. 18—. Attest, —, clerk. [Seal.] —, judge.

SECTION 52. No debt created by fraud or embezzlement of the debtor, or by his defalcations as a public officer, or while acting in a fiduciary character, shall be discharged under this act, but the debt may be proved, and the dividend thereon shall be a payment on account of said debt; and no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the debtor, either as partner, joint contractor, indorser, surety, or otherwise.

SECTION 53. A discharge, duly granted under this act, shall, with the exceptions aforesaid, release the debtor from all claims, debts, liabilities, and demands, set forth in his schedule, or which were or might have been proved against his estate in insolvency, and may be pleaded by a simple averment that on the day of its date such discharge was granted to him, setting forth the same in full, and the same shall be a complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be prima facie evidence in favor of such fact, and of the regularity of such discharge; *provided, however*, that any creditor of said debtor, whose debt was proved, or provable, against the estate in insolvency, who shall see fit to contest the validity of such discharge on the ground that it was fraudulently obtained,

and who has discovered the facts constituting the fraud subsequent to the discharge, may, at any time within two years after the date thereof, apply to the court which granted it to be set aside and annul the same; or if the same shall have been pleaded, the effect thereof may be avoided collaterally upon any such grounds.

SECTION 54. The refusal of a discharge to the debtor shall not affect the administration and distribution of his estate under the provisions of this act.

SECTION 55. If any person, being insolvent, or in contemplation of insolvency, within one month before the filing of a petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment or seizure, having reasonable cause to believe that such person is insolvent, and that such attachment, seizure payment, pledge, conveyance, transfer, or assignment is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in any way hinder, impede, or delay the operation of, or to evade any the provisions of this act, such transfer, payment, conveyance, pledge, or assignment is void, and the assignee may recover the property, or the value thereof, as assets of such insolvent debtor; and if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be prima facie evidence of fraud.

#### ARTICLE IX.—PENAL CLAUSES.

SECTION 56. From and after the taking effect of this act, if any debtor or insolvent shall, after the commencement of proceedings in insolvency, secrete or conceal any property belonging to his estate, or part with, conceal, or destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto, or remove, or cause to be removed, the same or any part thereof, with intent to prevent it from coming into the possession of the assignee in insolvency, or to hinder, impede, or delay his assignee in recovering or receiving the same, or make any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate, with like intent, or shall spend any part thereof in gaming; or shall, with intent to defraud, willfully and fraudulently conceal from his assignee, or fraudulently or designedly omit from his schedule any property

or effects whatsoever; or if, in case of any person having to his knowledge or belief proved a false or fictitious debt against his estate, he shall fail to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or shall attempt to account for any of his property by fictitious losses or expenses; or shall, within three months before the commencement of proceedings in insolvency, under the false pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels, with intent to defraud; or shall, with intent to defraud his creditors, within three months next before the commencement of proceedings in insolvency, pawn, pledge, or dispose of otherwise than by *bona fide* transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for—he shall be deemed guilty of misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for not less than three months nor more than two years.

#### ARTICLE X.—MISCELLANEOUS.

SECTION 57. If any debtor shall die after the order of adjudication, the proceedings shall be continued and concluded in like manner and with like validity and effect as if he had lived.

SECTION 58. Pending proceedings by or against any person, copartnership, or corporation, no statute of limitations of this state shall run against a claim which in its nature is provable against the estate of the debtor.

SECTION 59. An creditor, at any stage in the proceedings, may be represented by his attorney or duly authorized agent.

SECTION 60. It shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart for the use and benefit of said insolvent such real and personal property as is by law exempt from execution; and also a homestead, in the manner as provided in section one thousand four hundred and sixty-five of the Code of Civil Procedure. But no property or homestead shall be set apart, as aforesaid, until it is first proved that notice of the hearing of the application therefor has been duly given by the clerk, by causing notices to be posted in at least three public places in the county at least ten days prior to the time of such hearing, setting forth the name of said insolvent debtor, and the time and place appointed for the hearing of such application, which said notice shall briefly indicate the homestead sought to be exempted or the property sought to be set aside; and the decree must show that such proof was made to the satisfaction of the court, and shall be conclusive evidence of that fact. [*In effect 60 days from February 27, 1893. Statutes p. 45.*]

[ORIGINAL SECTION.]

SECTION 60. It shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart for the use and benefit of said insolv-

ent such real and personal property as is by law exempt from execution; and also a homestead, in the manner as provided in section fourteen hundred and sixty-five of the Code of Civil Procedure.

SECTION 61. The filing of the petition by or against a debtor upon which an order of adjudication in insolvency may be made by the court shall be deemed to be the commencement of proceedings in insolvency under this act.

SECTION 62. Words used in this act in the singular include the plural, and in the plural the singular, and the word "debtor" includes partnerships and corporations.

SECTION 63. Repealed. [*In effect April 6, 1891.*]

[ORIGINAL SECTION.]

SECTION 63. A receiver may be appointed by the court in which an insolvent proceeding is pending before the election of an assignee:

1. Upon the application of creditors, where it is shown that the property, or any portion thereof, is in danger of being lost, removed, or materially injured.

2. In all other cases where receivers are appointed by the usages of courts of equity. And thereupon the appointment, oath, undertaking, and powers of such receiver shall in all respects be regulated by the general laws of the state applicable to receivers.

SECTION 64. All sections of the Code of Civil Procedure of the state of California, relating to contempts, are hereby made applicable to all proceedings under this act. An appeal shall be allowed to the Supreme Court from any order adjudging any person guilty of contempt of court.

SECTION 65. When an attachment has been made and is not dissolved before the commencement of proceedings in insolvency, or is dissolved by an undertaking given by the defendant, if the claim upon which the attachment suit was commenced is proved against the estate of the debtor, the plaintiff may prove the legal costs and disbursements of the suit, and of the keeping of the property, and the amount thereof shall be a preferred debt. In all contested matters in insolvency the court may, in its discretion, award costs to either party, to be paid by the other, or to either or both parties, to be paid out of the estate, as justice and equity may require. In awarding costs the court may issue execution therefor. In all involuntary cases under this act the court shall allow the petitioning creditors out of the estate of the debtor, if any adjudication of insolvency be made, as a preferred claim, all legal costs and disbursements incurred by them in that behalf.

SECTION 66. The court may, upon the application of the debtor if it be a voluntary petition, or of the petitioning creditors if a creditor's petition, dismiss the petition and discontinue the proceedings at any time before the appointment of assignee. After the appointment of assignee no dismissal shall be made without the consent of all parties interested in or affected thereby.

SECTION 67. An appeal may be taken to the Supreme Court in the following cases:

1. From an order granting or refusing an adjudication of insolvency;
2. Allowing or rejecting a creditor's claim, in whole or in part;
3. Overruling a motion for a new trial;
4. Settling an account of an assignee;
5. Against or in favor of setting apart homestead or other property claimed as exempt from execution;
6. Granting or refusing a discharge to the debtor.

The notice, undertaking, and procedure on appeal shall conform to the general laws of this state regulating appeals in civil cases, except that when the assignee has given an official undertaking and appeal from a judgment or order in insolvency, his official undertaking stands in the place of an undertaking on appeal, and the sureties therein are liable on such undertaking.

SECTION 68. All acts and parts of acts in conflict with the provisions of this act are hereby repealed; *provided, however*, that such repeal shall in no manner invalidate or affect any case in insolvency instituted and pending in any court prior to the day when this act shall take effect.





## INSOLVENT ACT OF 1852.

*An Act for the relief of insolvent debtors and protection of creditors.*

[Approved May 4th, 1852; in effect June 1st, 1852.]

SECTION 1. Every insolvent debtor may be discharged from his debts as hereinafter provided, upon executing an assignment of all his property, real, personal, or mixed, for the benefit of all his creditors, and upon compliance with the several provisions of this Act; *provided*, said assignment be made *bona fide* and without fraud. The District Court only shall have original jurisdiction in the subject matter herein contained.

SECTION 2. Such insolvent debtor shall petition the judge having original jurisdiction within the place of his domicile, or usual residence, which petition shall briefly state the circumstances which compel him to surrender his property to his creditors, and shall conclude with a prayer to make a cession of his estate, and to be discharged from his debts, in pursuance of the provisions of this Act; *provided*, such insolvent debtor shall have resided within the county where he files his petition, for at least six months next preceding the filing of the same. [*Amendment approved April 27, 1860.*]

[ORIGINAL SECTION.]

SECTION 2. Such insolvent debtor shall petition the judge having original jurisdiction within the place of his domicile or usual residence, which petition shall briefly state the circumstances which compel him to surrender his property to his creditors, and shall conclude with a prayer to make a cession of his estate, and to be discharged from his debts, in pursuance of the provisions of this Act.

SECTION 3. The debtor shall annex to said petition, his schedule; that is to say, a summary statement of his affairs, with a list of losses he may have sustained, giving the names of his creditors if known; the amount due to each creditor, and the cause and nature of said indebtedness, and when it accrued, and a statement of any existing judgment, mortgage, collateral or other securities for the payment of any such debt; said schedule shall also contain a full, complete, and perfect inventory of all his property, real, personal, and mixed, of all choses in action, debts due or to become due, and all moneys on hand of such insolvent; said schedule shall also contain a full statement of all incumbrances existing upon the property of the insolvent. The

said debtor shall as nearly as possible estimate the property by him surrendered, and set forth in the schedule, at its true cash value.

SECTION 4. The said schedule shall be signed by the debtor, and be by him sworn to before the judge having jurisdiction of the failure, in the following words, to wit: "I, A. B., do in the presence of Almighty God truly and solemnly swear, that the schedule now delivered by me, doth contain a full, perfect and true discovery of all the estate, real, personal, and mixed, goods and effects, to me in any way belonging; all such debts as are to me owing, or to any person, or persons in trust for me, and all securities and contracts whereby any money may hereafter become payable, or any benefit or advantage accrue to me; or to my use, or to any other person or persons in trust for me, that I have no lands, money, stock or estate, reversion or expectancy, besides that set forth in my schedule; that I have in no instance, created or acknowledged a debt for a greater sum than I honestly and truly owed; that I have not directly or indirectly sold or otherwise disposed of in trust, or concealed any part of my property, effects or contracts; that I have not in any way compounded with my creditors whereby to secure the same, or to receive, or to expect any profit or advantage therefrom, or to defraud, or deceive any creditor to whom I am indebted, in any manner whatever, So help me God."

SECTION 5. The judge receiving such petition, schedule and affidavit, shall make an order requiring all the creditors of such insolvent to show cause, if they can, why an assignment of the insolvent estate should not be made, and he be discharged from his debts. Said schedule being signed and sworn to by the petitioner, the judge shall certify the same, and cause it to be filed in the office of the clerk of the court in the county where the assignment was made, there to remain for the information of the creditors.

SECTION 6. The insolvent debtor, on a surrender of his property, shall include and set forth in his schedule his whole estate, including the homestead, if any he has, and all such property as may be by law exempt on execution from seizure and forced sale; and it shall be the duty of the judge having jurisdiction of the failure, to exempt and set apart for the use and benefit of said insolvent, such real and personal property as he is by law authorized to retain to his own use, or that of his family.

SECTION 7. The insolvent shall either before or on the day appointed for the meeting of the creditors, deliver to the court all the commercial or other books he may have kept, which books shall be deposited in the clerk's office of said court. Said insolvent shall also deliver to the court, at the same time, all vouchers, notes, bonds, bills, securities, or other evidence of debt, in any manner relating to, or having any bearing upon or connection with, the property surrendered by said debtor; and all such papers or securities shall be deposited in the clerk's office of said court, and the clerk shall hand them over, together with the books of the insolvent, to the assignees who may be appointed.

SECTION 8. The judge granting the order for a meeting of the creditors, shall direct the clerk of the court to issue a notice calling the creditors of the insolvent to be and appear upon a specified day, not less than thirty nor more than forty days from the first publication of such notice, before said judge, either in chambers or in open court, as said judge shall order, to show cause why the prayer of the alleged insolvent should not be granted. Said notice shall be published at least once a week for four successive weeks in a newspaper printed in the county in which the application is made, if there is one; if there be none so published, then in a newspaper published in any county adjoining said county. [*Amendment approved April 27, 1863.*]

[ORIGINAL SECTION.]

SECTION 8. The judge granting the order for a meeting of the creditors, shall direct the clerk of the court to issue a notice, calling the creditors of the insolvent to be and appear within thirty days from the date of the publication of such notice, before said judge, at chambers, or in open court, to show cause why the prayer of the insolvent should not be granted. Said notice shall be published at least thirty days in a newspaper printed in the county in which application is made, if there be one; if there be none, then in a newspaper printed nearest to such county.

SECTION 9. When issuing the order for the meeting of creditors, the judge shall order that all proceedings against the debtor be stayed; *provided, however,* that the said stay of proceedings shall not prevent the judge who shall have granted it, from appointing a receiver to take possession of all property of the debtor, for the benefit of all his creditors, if one or more of his creditors, his agent, or attorney in fact, shall apply for such appointment, and swear that he has reason to believe, and does believe, that the debtor may avail himself of the stay of proceedings, and keep his property from his creditors, if no cause sufficient in the judgment of the court shall have been shown why the debtor should not have the benefit of this act, and shall produce satisfactory proof of the facts on which his affidavit is founded.

SECTION 10. At the meeting of creditors, the said creditors, after having certified on oath that their respective claims are legitimate and true, shall proceed to the appointment of one or more assignees, not exceeding three; in appointing assignees, the opinion of the majority of said creditors, in sums or in claims, shall prevail. At such meeting, any creditor may be represented by his duly authorized agent, or attorney in fact.

SECTION 11. When the assignee or assignees shall have been duly appointed in the meeting of creditors, and the surrender of the property shall have been duly accepted of, it shall be the duty of said assignees to deposit in the clerk's office of the court who shall have issued the order for a call of the creditors, a certified statement of the deliberations of said creditors, on the appointment of the said assignees.

SECTION 12. The judge shall require from the assignees a bond with one or more good and sufficient sureties, on which bond the parties therein shall be liable, jointly and severally, for the amount thereof, conditioned for the faithful performance of the duties devolving upon said assignees. The amount of such bond

shall be determined by the majority of creditors; should not the creditors so determine, the amount of said bond shall be fixed by the court having jurisdiction of the failure.

SECTION 13. The assignees shall apply by petition to the court, who shall have ordered a meeting of creditors, to be authorized to sell at public auction, and to the best and highest bidder for cash, all the insolvent debtor's property of whatsoever nature or kind; and said assignees shall give at least twenty days' public notice, in the same manner as notice for a meeting of creditors of all sales of the property of said insolvent, giving at the same time a full description of the property to be disposed of; *provided, however*, that if any of the property surrendered be of a perishable nature, the assignee shall be authorized to sell the same, on giving at least five days notice of such sale by publication or notice of such sale, as in sale on execution.

SECTION 14. The assignees shall deposit all funds belonging to the failure in their joint names, so that nothing can be drawn without the consent of all. Said funds shall remain inviolable, and shall never be loaned, used or mixed with the personal affairs of the assignees; and finally, the said assignees shall make a distribution of the proceeds of the property of the insolvent, agreeably to the direction of the court; said assignees may sue and be sued, either as plaintiffs or defendants, in everything which respects the rights and actions which may belong to the insolvent, or which may concern the mass of the creditors. All suits brought against the insolvent anterior to his surrender of property, before the courts of other counties, shall be transferred to the court having jurisdiction in the county in which said insolvent shall have presented his schedule, and may be continued on motion and notice against his assignees.

SECTION 15. Whenever a dividend shall be declared, the assignees shall make out a statement containing the names of the several creditors, mentioning the sums which are due them respectively; and the said statement shall besides contain the *pro rata* sums to be divided among all the creditors. Said assignees shall deposit said statement in the clerk's office of the court, who shall order that notice be given to the creditors in the same manner as for the meeting, that they show cause within fifteen days next following the publication, why the said statement should not be accepted, and the distribution made agreeably to its contents.

SECTION 16. Two or more creditors may at any time make a motion to know if the assignees have funds in their hands, and the said assignees shall be required to present their accounts, and if they have funds they shall distribute them without delay.

SECTION 17. Should the assignee refuse or neglect to render their accounts as required by the preceding section, or to pay over a dividend, when they shall have, in the opinion of the court, sufficient funds for that purpose in their hands, the court shall immediately discharge such assignees from their trust, and shall have power to appoint others in their place. The assignees so discharged, shall deliver over to those appointed by the court,

all the funds, property, books, vouchers and securities belonging to the insolvent, without charging any commission or expenses thereon, and shall also be condemned to pay to the new assignee, for the benefit of the mass of the creditors, twenty per cent. in addition to the amount of funds in their hands.

SECTION 18. If on the day appointed for the meeting, the creditors, although duly summoned, do not attend, or refuse to appoint one or more assignees, it shall be lawful for the judge before whom the said meeting may take place, to authorize the sheriff of the county to receive the surrender of property offered by the debtor, and to perform in every respect the functions of assignee, and for the faithful performance of said trust, he shall be responsible on his official bond; *provided*, that if any of the creditors should choose to take that charge, the judge shall appoint said creditor for that purpose, upon said creditor giving bond, with good and sufficient security proportioned to the value of the property committed to his charge.

SECTION 19. The assignees, collectively, shall be entitled to charge and receive for their services, to wit: ten per centum upon a sum not exceeding ten thousand dollars; eight per centum upon sums above ten thousand dollars, and not exceeding thirty thousand dollars; six per centum upon sums above thirty thousand dollars, and not exceeding sixty thousand dollars; and four per centum on all sums exceeding sixty thousand dollars; *provided*, that the said commissions shall be allowed only on such net sums of money as shall actually come to their hands, or be distributed by them. The mass of creditors shall in no manner be liable for the fees of counsel of the insolvent debtor in conducting a surrender of the property.

SECTION 20. That in case after the appointment of said assignees, any one or more of the creditors of the insolvent debtor should deem necessary to oppose it, on the ground of some fraud having been committed by the said insolvent debtor or of the appointment not having been legally made, he shall within ten days next following the appointment of said assignees, lay before the court which has already taken cognizance of the case, his written opposition, stating specially the several facts of nullity of the said appointment, or of fraud by him alleged against the insolvent debtor, whereupon, in case of accusation of fraud, after having received the said insolvent debtor's answer, the court shall order a jury to be summoned, of not less than six men, to be summoned in the same manner as juries are summoned in the District Court, for the purpose of deciding on the said accusation.

SECTION 21. On the day or at the term appointed in such order, or on any subsequent day or term, the court shall proceed to hear the proofs and allegations of the parties; and before any other proceedings be had, shall require proof of the publication of the notice as herein provided.

SECTION 22. Upon such an accusation of fraud, the creditor who shall have brought the same shall have the right to interrogate the insolvent debtor on oath, and put to him such written questions, as to the state of his affairs, and the several transac-

tions in which he may have been engaged anterior to his failure, as he shall think proper; and the insolvent shall answer, in writing, to the said interrogatories in a pertinent and distinct manner; and every equivocal answer on his part shall be construed against him.

SECTION 23. If the jury summoned for the purpose of deciding on the accusation of fraud, brought against such insolvent debtor, declare in their verdict that said insolvent has been guilty of fraud, the said debtor shall forever be deprived of the benefit of the laws passed for the relief of insolvent debtors in the state.

SECTION 24. If the accusation of fraud brought against the debtor is declared to be ill-founded, or if there be no opposition to the surrender of his property, and, *provided*, said surrender has been made according to the provisions of this act, said debtor shall be released and fully discharged from any and all debts until then contracted, and contracted after the passage of this act, and from every judicial proceeding relative to the same; *provided, always*, that the release and discharge authorized by this section shall not apply to debt and liabilities not mentioned and set forth in the schedule, unless the insolvent shall declare in his petition that it is his desire to be discharged from all his debts and liabilities, and that he has described them according to the best of his knowledge and recollection; in which case the discharge and release authorized by this section shall embrace all his debts and liabilities, notwithstanding they may have been imperfectly described, or not described at all. [*Amendment approved April 27, 1860.*]

[ORIGINAL SECTION.]

SECTION 24. If the accusation of fraud brought against the debtor is declared to be ill-founded, or if there be no opposition to the surrender of his property, and, *provided* said surrender has been made according to the provisions of this act, said debtor shall be released and fully discharged from any and all debts, until then contracted, and contracted after the passage of this act, and from every judicial proceeding relative to the same; *provided, always*, that said insolvent debtor shall be released and discharged only from such debts and liabilities as he shall have set forth, and named in his schedule.

SECTION 25. Any insolvent debtor who shall be found guilty of fraud as aforesaid, shall forever be deemed incapable of holding any office of trust or profit under the government of this state, shall moreover be liable to be prosecuted and punished as a perjurer, if he should be convicted of having foresworn himself in any of the declarations he may have made agreeably to the provisions of this Act, and if convicted of fraud he shall be sentenced by the court to suffer imprisonment at hard labor in the state prison, for a term not less than six months, nor more than two years.

SECTION 26. If the judge before whom the accusation of fraud is brought, or an opposition to the appointment of assignees is made, thinks that the interest of the mass of the creditors of the insolvent may suffer by a delay of the approval of the appointment of the assignees, it shall be lawful for said judge, all opposition notwithstanding, to approve previously the said

appointment, if he finds that it has been made agreeably to law.

SECTION 27. That all persons shall be considered as fraudulent bankrupts, who shall be convicted of having concealed their property with the intention to keep it from their creditors, as also those who shall be convicted of having concealed or altered their books, or papers, with the same intention.

SECTION 28. That every insolvent debtor shall also be considered as a fraudulent bankrupt who shall be convicted of having passed sham deeds for the purpose of conveying the whole or any part of his property, and depriving his creditors thereof, or of having knowingly omitted to declare any of his property, rights, or claims in his schedule, or of having purloined his books, or any of them, or of having altered, changed, or made them anew, to an intent to defraud his creditors, or of having alienated, mortgaged or pledged any of his property, or of having committed any other kind of fraud to the prejudice of his creditors.

SECTION 29. If any debtor shall be convicted of having at any time within three months next preceding his failure, sold, engaged, or mortgaged any of his goods and effects, or of having otherwise assigned, transferred, or disposed of the same, or any part thereof, or confessed judgment in order to give a preference to one or more of his creditors over the others, whereby to receive any advantages in anticipation of his failure, to the prejudice of his creditors, he shall be debarred the benefit of this Act.

SECTION 30. All insolvent debtors owing, or accountable in any manner for public funds or property of whatever nature or kind; all unfaithful depositaries; all such as refuse or neglect to pay up all funds received by them as bankers, brokers, commission merchants, or for money, goods, or effects received by them in a fiduciary capacity, shall be denied the benefit of this Act; *provided*, that such parties may avail themselves of this act for the purpose of procuring an equal distribution of their assets among their creditors, and for that purpose only said act shall apply to estates of such insolvents in this section mentioned; *and, provided further*, such debtor may be discharged from all debts not named in this section. [*Amendment approved March 12, 1858.*]

[ORIGINAL SECTION.]

SECTION 30. All insolvent debtors owing or accountable in any manner for public funds or property of whatever nature or kind; all unfaithful depositaries; all such as refuse or neglect to pay up all funds received by them as bankers, brokers, commission merchants, or for money, goods, or effects received by them in a fiduciary capacity, shall be denied the benefit of this act.

SECTION 31. If, after the presentation of his petition, the insolvent shall sell, or in any manner transfer or assign any of his property, or collect any debts due him, and shall not give a just and true account of the property so sold or transferred, and the moneys so collected, and pay the same over to the assignees, within ten days after their appointment, said debtor shall not receive the benefit of this act.

SECTION 32. Whenever any insolvent debtor has had the

benefit of this act, if thereafter at any time it is made to appear that he has concealed any part of his property or estate, or given a false schedule, or committed any fraud under the provisions of this act, it is hereby declared that he has forfeited all benefit and advantage which he would otherwise have had by virtue of this act, and he cannot avail himself of any of its provisions, in bar to any claim that may be instituted against him.

SECTION 33. No person can apply for, or receive the benefit of this act, through an agent or attorney in fact.

SECTION 34. From and after the surrender of the property of the insolvent debtor, all property of such insolvent shall be fully vested in his assignee or assignees, for the benefit of his creditors, and shall not be liable to be seized, attached, taken, or levied on, by virtue of any execution issued against the property of said insolvent; and the assignees who may be appointed shall take possession of, and be entitled to claim and recover all the said property, and to administer and sell the same, as herein provided.

SECTION 35. If there be any creditors residing without the limits of this state, the judge shall appoint an attorney to represent them; but the fees of said attorney shall in no case be paid by the mass of creditors, but shall be levied on the amount of the sums which shall be recovered for the account of such non-resident creditors, at the rate of ten per centum; *provided*, that in no case shall the whole fees allowed to counsel appointed on behalf of said creditors, exceed the sum of three hundred and fifty dollars.

SECTION 36. In case the debtor who applies for the benefit of this act should have no property to surrender to his creditors, or if the appraised value of the property exhibited in his schedule should not amount to more than one-third of his debts, in case he should already have received the benefit of this act, during the year next preceding, the judge before whom application is made shall not admit him to the benefit of this law, unless it be proven to the said judge, by affidavit sworn and subscribed to by two credible and disinterested witnesses, that the debtor has really experienced the losses by him stated, and that the said losses may have reduced him to the situation in which he finds himself; *provided*, all legal mortgages and liens *bona fide* existing on such property at the time of the surrender, as aforesaid, shall remain good and valid, and may be enforced in the same manner as though no such surrender had been made.

SECTION 37. All the goods, titles and claims which the insolvent debtor shall have declared in his schedule, shall be delivered up to the assignees as soon as they shall have been appointed; and in case the debtor should refuse to deliver up the goods, titles, effects or estates in his possession, the judge shall oblige to that delivery, either by ordering the sheriff to seize the said property, to be by him delivered up to the assignees, or causing the said insolvent to be imprisoned until the said delivery shall be effected.

SECTION 38. The assignee or assignees appointed under this



act, shall make out a true account of all disbursements made by them in discharge of their duties as assignee or assignees, which shall be verified by the oath of such assignee or assignees, and shall deliver the same to the judge having jurisdiction of the subject matter; and such judge shall in writing certify such part or parts of the same as he shall deem to be just, and necessarily expended by said assignee or assignees, in the discharge of their duty, which amount so allowed shall be paid out of the property of such insolvent debtor.

SECTION 39. No assignment of any insolvent debtor, otherwise than as provided in this act, shall be legal or binding upon creditors.

SECTION 40. All laws or parts of laws repugnant to, or in any manner conflicting with the provisions of this act, are hereby repealed. This act shall take effect from and after the first day of June next.

An Act supplementary to an act entitled an Act for the relief of insolvent debtors and protection of creditors, approved May fourth, eighteen hundred and fifty-two, and the acts amendatory thereof and supplemental thereto.

[Approved March 31, 1876; 1875-6.]

SECTION 1. A petition may be filed in the county court of the county in which any person resides or has his place of business, signed by three or more creditors of such person, and verified by at least two of such signers, setting forth that such person is indebted to them respectively in amounts which must be stated in the petition, and that such person is about to depart from the state with intent to defraud his creditors; or, being absent from the state with such intent, remains absent; or conceals himself to avoid the service of legal process; or conceals or is removing any of his property to avoid its being attached or taken on legal process; or has made any assignment, gift, sale, conveyance or transfer of his estate, property, rights, or credits, with intent to delay, defraud or hinder his creditors; or has been arrested and held in custody by virtue of any civil process of court founded on any debt or demand, and such process remains of force, and not discharged, by payment or otherwise, for a period of twenty days; or, being insolvent or in contemplation of insolvency, has made any payment, gift, grant, sale, conveyance or transfer of money or other property, estate, rights, or credits; or has confessed judgment, or suffered or procured his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or with the intent, by such disposition of his property, to delay, defraud, or hinder his creditors; or has fraudulently stopped payment; or has stopped or suspended, and not resumed payment within a period of forty days, of any commercial paper made or passed in the course of his business; or, being a bank or banker, broker or commission merchant, has failed for forty days to pay any moneys deposited with or received by him, for goods or other effects, in a fiduciary capacity, upon demand of payment lawfully made; or that the property of such person has been attached by a creditor or creditors other than such peti-

tioners, and the attachment has not been released or dissolved within two months thereafter. The court shall thereupon issue an order requiring such debtor to show cause, at a time and place to be fixed by said court, why he should not be adjudged an insolvent debtor, and the surrender of his estate be made for the benefit of his creditors in the manner required of insolvent debtors. No creditors must sign said petition whose debt or demand is less than two hundred and fifty dollars in gold coin of the United States.

SECTION 2. A copy of said petition, with a certified copy of the order to show cause, shall be served on said debtor personally, or left at his last or usual place of abode, at least five days before the time fixed for the hearing; or, if such debtor cannot be found or his place of residence ascertained, service thereof shall be made by publication in such manner as the court may direct.

SECTION 3. At the time fixed for the hearing, or such other time as it may be adjourned to, and upon proof being made to the satisfaction of the court of such service or publication, the court shall inquire if the facts set out in said petition are true; and the issues raised thereon may be tried, with or without a jury, as may be agreed upon.

SECTION 4. If the debtor shall make default, or if it shall be found that the facts set out in said petition are true, the court shall make an order adjudging that said debtor is, and was at the time of the filing of said petition, insolvent within the true intent and meaning of the acts to which this is supplemental, and shall require said debtor, within such time as may be required, to file in said court a statement of his affairs in the manner and mode required by said acts; and thereupon all proceedings shall be had in said matter in the same manner as if said debtor had voluntarily filed his petition.

SECTION 5. If said debtor shall fail to file such statement, the court shall have the power to furnish [punish] such debtor as for a contempt, and may order the petitioning creditors to make such statement.

SECTION 6. If any debtor shall be adjudged insolvent, either under this act or the acts to which it is supplementary, all attachments upon the property of said debtor which were levied at any time within two months before filing the petition are dissolved, and all such property shall vest in the manner and with like effect as provided in said acts, in the assignee or assignees to be appointed in such cases.

SECTION 7. In all cases under this act the court shall allow to the petitioning creditors, out of the estate of the debtor, as preferred claim, all costs and expenses incurred by them in that behalf; *provided, however*, if on the hearing, as provided in section four of this act, it shall be adjudged that the facts set out in the petition of the creditor are not sustained, the debtor shall recover from such creditors his costs incurred by him, to be recovered in the same manner as on final judgment in civil actions. All costs and expenses incurred by an attaching cred-

itor shall be provable and allowed against the estate of the debtor.

SECTION 8. If any person, being insolvent, or in contemplation of insolvency within two months before the filing of a petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe that such person is insolvent, and that such attachment, seizure, payment, pledge, conveyance, transfer, or assignment is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in any way hinder, impede, or delay the operation of, or to evade any of the provisions of this act, or of the act or acts to which this act is supplemental, or of which this act is amendatory, such transfer, payment, conveyance, pledge, or assignment is void, and the assignee may recover the property, or the value thereof, as assets of such insolvent debtor; and if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud.

SECTION 9. This act shall take effect from and after its passage.



# UNITED STATES BANKRUPTCY ACT.

[Passed March 2, 1867, (Rev. Stat., U. S. 2nd Ed., 1878, p. 961,) subsequently amended, and repealed by Act passed June 7, 1878 in effect September 1, 1878.]

NOTE—Chapter One of the title “Bankruptcy” is omitted as it relates to U. S. Courts and registers in bankruptcy and has no applicability to California Law. Chapter Seven relating to fees and costs omitted for same reason.

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## VOLUNTARY BANKRUPTCY.

SECTION 5014. If any person residing within the jurisdiction of the United States, and owing debts provable in bankruptcy exceeding the amount of three hundred dollars, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain a discharge from his debts, and shall annex to his petition a schedule and inventory, in compliance with the next two sections, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt.

SECTION 5015. The said schedule must contain a full and true statement of all his debts, exhibiting, as far as possible, to whom each debt is due, the place of residence of each creditor, if known to the debtor, and if not known the fact that it is not known; also the sum due to each creditor; the nature of each debt or demand, whether founded on written security, obligation or contract, or otherwise; the true cause and consideration of the indebtedness in each case, and the place where such indebtedness accrued; and also a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same.

SECTION 5016. The said inventory must contain an accurate statement of all the petitioner's estate, both real and personal, assignable under this title, describing the same and stating where it is situated, and whether there are any, and, if so, what incumbrances thereon.

SECTION 5017. The schedule and inventory must be verified by the oath of the petitioner, which may be taken either before the district judge, or before a register, or before a commissioner of the circuit court.

SECTION 5018. Every citizen of the United States petitioning to be declared bankrupt shall, on filing his petition, and before any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath may be taken before either of the officers mentioned in the preceding section, and shall be filed and recorded with the proceedings in bankruptcy.

SECTION 5019. Upon the filing of such petition, schedule and inventory, the judge or register shall forthwith, if he is satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the marshal for the district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor; and to give such personal or other notice to any persons concerned as the warrant specifies.

SECTION 5020. Every bankrupt shall be at liberty, from [time] to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts.

#### INVOLUNTARY BANKRUPTCY.

SECTION 5021. Any person residing within the jurisdiction of the United States and owing debts provable in bankruptcy exceeding the amount of three hundred dollars:

*First.* Who departs from the state, district, or territory of which he is an inhabitant with intent to defraud his creditors, or, being absent, remains absent with such intent; or,

*Second.* Who conceals himself to avoid the service of legal process in any action for the recovery of a debt or demand provable in bankruptcy; or,

*Third.* Who conceals or removes any of his property to avoid its being attached, taken or sequestered on legal process; or,

*Fourth.* Who makes any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or,

*Fifth.* Who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of any state, district, or territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate, and for a sum exceeding one hundred dollars, if such process is remaining in force and not discharged by payment or in some other manner provided by the law of such state, district or territory, applicable thereto, for a period of seven days; or,

*Sixth.* Who has been actually imprisoned for more than seven

days in a civil action founded on contract, for the sum of one hundred dollars or upward; or,

*Seventh.* Who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency makes any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights or credits, or gives any warrant to confess judgment; or procures or suffers his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act; or,

*Eighth.* Who being a banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days, shall be deemed to have committed an act of bankruptcy, and to have become liable to be adjudged a bankrupt. And if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this title, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this title was intended, and that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy.

SECTION 5022. Any act of bankruptcy committed since the second day of March, eighteen hundred and sixty-seven, may be the foundation of an adjudication of involuntary bankruptcy, upon a petition filed within the time prescribed by law, equally with one committed hereafter.

SECTION 5023. An adjudication of bankruptcy may be made on the petition of one or more creditors, the aggregate of whose provable debts amounts to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed.

SECTION 5024. Upon the filing of the petition authorized by the preceding section, if it appears that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted. The court may also, by injunction, restrain the debtor, and any other person, in the meantime, from making any transfer or disposition of any part of the debtor's property not excepted by this title from the operation thereof and from any interference therewith; and if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels, or his evidence of property, or to make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest and safely keep the alleged debtor, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until its decision upon the petition, or until its further

order, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court.

SECTION 5025. A copy of the petition and order to show cause shall be served on the debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode; or, if the debtor cannot be found, and his place of residence cannot be ascertained, service shall be made by publication in such manner as the judge may direct. No further proceedings, unless the debtor appears and consents thereto, shall be had until proof has been given, to the satisfaction of the court, of such service or publication; and if such proof is not given on the return day of such order, the proceedings shall be adjourned and an order made that the notice be forthwith so served or published.

SECTION 5026. On such return day or adjourned day, if the notice has been duly served or published, or is waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demands, in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of the alleged bankruptcy. If the petitioning creditor does not appear and proceed on the return day, or adjourned day, the court may, upon the petition of any other creditor, to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.

SECTION 5027. If upon such hearing or trial the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens was the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover costs.

SECTION 5028. If upon the hearing or trial the facts set forth in the petition are found to be true, or if upon default made by the debtor to appear pursuant to the order, due proof of service thereof is made, the court shall adjudge the debtor to be a bankrupt, and shall forthwith issue a warrant to take possession of his estate.

SECTION 5029. The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to those [*hereinbefore*] [*hereinafter*] provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition.

SECTION 5030. The order of adjudication of bankruptcy shall require the bankrupt forthwith or within such number of days not exceeding five after the date of the order or notice thereof, as shall by the order be prescribed to make and deliver, or transmit by mail, post-paid to the messenger, a schedule of the creditors



and an inventory of his estate in the form and verified in the manner required of a petitioning debtor.

SECTION 5031. If the debtor has failed to appear in person, or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner provided for the service of the order to show cause; and if the bankrupt is absent or cannot be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain.

#### PROCEEDINGS TO REALIZE THE ESTATE FOR CREDITORS.

SECTION 5032. The notice to creditors under warrant shall state:

*First.* That a warrant in bankruptcy has been issued against the estate of the debtor.

*Second.* That the payment of any debts and the delivery of any property belonging to such debtor, to him or for his use, and the transfer of any property by him, are forbidden by law.

*Third.* That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

SECTION 5033. At the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required.

SECTION 5034. The creditors shall, at the first meeting held after due notice from the messenger in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts. If no choice is made by the creditors at the meeting, the judge, or if there be no opposing interest, the register, shall appoint one or more assignees. If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy. All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order a new election.

SECTION 5035. No person who has received any preference contrary to the provisions of this title shall vote for or be eligible as assignee; but no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility.

SECTION 5036. The district judge at any time may, and upon the request in writing of any creditor who has proved his claim shall, require the assignee to give good and sufficient bond to the

United States, with a condition for the faithful performance and discharge of his duties; the bond shall be approved by the judge or register by his indorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the bond within such time as the judge or register orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

SECTION 5037. Any assignee who refuses or unreasonably neglects to execute an instrument when lawfully required by the court, or disobeys a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

SECTION 5038. An assignee may, with the consent of the judge, resign his trust and be discharged therefrom.

SECTION 5039. The court, after due notice and hearing, may remove an assignee for any cause which, in its judgment, renders such removal necessary or expedient. At a meeting called for the purpose by order of the court, in its discretion, or called upon the application of a majority of the creditors in number and value, the creditors may, with consent of the court, remove any assignee by such a vote as is provided for the choice of assignee.

SECTION 5040. The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee.

SECTION 5041. Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court, or at its discretion by an election by the creditors, in the same manner as in the original choice of an assignee, at a regular meeting, or at a meeting called for the purpose, with such notice thereof in writing to all known creditors, and by such person as the court shall direct.

SECTION 5042. When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and in the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen.

SECTION 5043. Any former assignee, his executors or administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate. And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate.

SECTION 5044. As soon as an assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt.

with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings.

SECTION 5045. There shall be excepted from the operation of the conveyance the necessary household and kitchen furniture, and such other articles and necessities of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; also the wearing apparel of the bankrupt, and that of his wife and children, and the uniform, arms, and equipments of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws of each state, as existing in the year eighteen hundred and seventy-one; and such exemptions shall be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding. These exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee; and in no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this title; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court.

SECTION 5046. All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent rights, and copy-rights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the

exceptions stated in the preceding section, be at once vested in such assignee.

SECTION 5047. The assignee shall have the like remedy to recover all the estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If at the time of the commencement of the proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. And if any suit at law or in equity, in which the bankrupt is a party in his own name, is pending at the time of the adjudication of bankruptcy, the assignee may defend the same in the same manner and with the like effect as it might have been defended by the bankrupt.

SECTION 5048. No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving or remaining or new assignee, as the case may be, he shall be admitted to prosecute the suit in like manner and with like effect as if it had been originally commenced by him.

SECTION 5049. A copy duly certified by the clerk of the court, under the seal thereof, of the assignment, shall be conclusive evidence of the title of the assignee to take, hold, sue for, and recover the property of the bankrupt.

SECTION 5050. No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon.

SECTION 5051. The debtor shall, at the request of the assignee and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt.

SECTION 5052. No mortgage of any vessel or of any other goods or chattels, made as security for any debt, in good faith and for a present consideration and otherwise valid, and duly recorded pursuant to any statute of the United States or of any State, shall be invalidated or affected by an assignment in bankruptcy.

SECTION 5053. No property held by the bankrupt in trust shall pass by the assignment.

SECTION 5054. The assignee shall immediately give notice of his appointment, by publication at least once a week for three successive weeks in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside, and shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded. [And the record of such assignment, or a duly certified copy thereof, shall be evidence thereof in all courts.]

SECTION 5055. The assignee shall demand and receive, from all persons holding the same, all the estate assigned or intended to be assigned.

SECTION 5056. No person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so.

SECTION 5057. No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed.

SECTION 5058. The assignee shall keep a regular account of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort.

SECTION 5059. The assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be liable to be taken as his property or for the payment of his debts.

SECTION 5060. When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or register, or may authorize it to be deposited in any convenient bank, upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon.

SECTION 5061. The assignee, under the direction of the court, may submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators to be chosen by him and the other party to the controversy, and, under such direction, may compound and settle any such controversy, by agreement with the other party, as he thinks proper and most for the interest of the creditors.

SECTION 5062. The assignee shall sell all such unincumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors; but upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place, and manner of sale as will, in his opinion, prove to the interest of the creditors.

SECTION 5063. Whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed

by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

SECTION 5064. The assignee may sell and assign, under the direction of the court and in such manner as the court shall order, any outstanding claims or other property in his hands, due or belonging to the estate, which cannot be collected and received by him without unreasonable or inconvenient delay or expense.

SECTION 5065. When it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold, in such manner as may be deemed most expedient, under the direction of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of.

SECTION 5066. The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other incumbrance.

SECTION 5067. All debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. When the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate.

SECTION 5068. In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.

SECTION 5069. When the bankrupt is bound as drawer, indor-

ser, surety, bail, or guarantor upon any bill, bond, note, or other specialty or contract, or for any debt of another person, but his liability does not become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability becomes fixed, and before the final dividend is declared.

SECTION 5070. Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt or to stand in the place of the creditor if the creditor has proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the general orders, and subject to such regulations and limitations as may be established by such general orders.

SECTION 5071. Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

SECTION 5072. No debts other than those specified in the five preceding sections shall be proved or allowed against the estate.

SECTION 5073. In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed in favor of any debtor to the bankrupt of a claim in its nature not provable against the estate, or of a claim purchased by or transferred to him after the filing of the petition.

SECTION 5074. When the bankrupt, at the time of adjudication, is liable upon any bill of exchange, promissory note, or other obligation in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader and also as a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts.

SECTION 5075. When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of

the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

SECTION 5076. Creditors residing within the judicial district where the proceedings in bankruptcy are pending shall prove their debts before one of the registers of the court, or before a commissioner of the circuit court within the said district. Creditors residing without the district, but within the United States, may prove their debts before a register in bankruptcy, or a commissioner of a circuit court, in the judicial district where such creditor, or either one of joint creditors, reside; but proof taken before a commissioner, shall be subject to revision by the register of the court.

SECTION 5077. To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, under oath, and signed by the deponent, setting forth the demand, the consideration thereof, whether any and what securities are held therefor, and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person, for his use, received any security or satisfaction whatever other than that by him set forth; that the claim was not procured for the purpose of influencing the proceedings in bankruptcy; and that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the claim, or any part thereof, or to take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor for assignee, or any action on the part of such creditor, or any other person in the proceedings, is or shall be in any way affected, influenced or controlled. No claim shall be allowed unless all the statements set forth in such deposition shall appear to be true.

SECTION 5078. Such oath shall be made by the claimant, testifying of his own knowledge, unless he is absent from the United States or prevented by some other good cause from testifying, in which case the demand may be verified by the attorney or authorized agent of the claimant, testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge. Corporations may verify their claims by the oath of their president, cashier, or treasurer. The court may require or receive further pertinent evidence either for or against the admission of any claim.

SECTION 5079. Such oath may be taken in any district before any register or any commissioner of the circuit court authorized to administer oaths; or, if the creditor is in a foreign country,



before any minister, consul, or vice-consul of the United States. When the proof is so made it shall be delivered or sent by mail to the register having charge of the same.

SECTION 5080. If the proof is satisfactory to the register it shall be delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time of receipt of such proof, and the amount and nature of the debts. Such books shall be open to the inspection of all the creditors. The court may require or receive further pertinent evidence either for or against the admission of any claim.

SECTION 5081. The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of a claim, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake.

SECTION 5082. A bill of exchange, promissory note, or other instrument, used in evidence upon the proof of a claim and left in court or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall indorse upon it the name of the party against whose estate it has been proved, and the date and amount of any dividend declared thereon.

SECTION 5083. When a claim is presented for proof before the election of the assignee, and the judge or register entertains doubts of its validity or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen.

SECTION 5084. Any person who, since the second day of March, eighteen hundred and sixty-seven, has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provisions of the act of March two, eighteen hundred and sixty-seven, chapter one hundred and seventy-six, to establish a uniform system of bankruptcy, or to any provisions of this title, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference.

SECTION 5085. The court shall allow all debts duly proved and shall cause a list thereof to be made and certified by one of the registers.

SECTION 5086. The court may, on the application of the assignee, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and sub-

mit to an examination, on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, to his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate and the due settlement thereof according to law. Such examination shall be in writing, and shall be signed by the bankrupt and filed with the other proceedings.

SECTION 5087. The court may, in like manner, require the attendance of any other person as a witness, and if such person fails to attend, on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person and bring him forthwith before the court, or before a register in bankruptcy, for examination as a witness.

SECTION 5088. For good cause shown, the wife of any bankrupt may be required to attend before the court to the end that she may be examined as a witness; and if she does not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he proves to the satisfaction of the court that he was unable to procure her attendance.

SECTION 5089. If the bankrupt is imprisoned, absent, or disabled from attendance, the court may order him to be produced by the jailer, or any officer in whose custody he may be, or may direct the examination to be had, taken, and certified at such time and place and in such manner as the court may deem proper; and with like effect as if such examination had been had in court.

SECTION 5090. If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

SECTION 5091. All creditors whose debts are duly proved and allowed, shall be entitled to share in the bankrupt's property and estate, pro rata, without any priority or preference whatever, except as allowed by section fifty-one hundred and one. No debt proved by any person liable, as bail, surety, guarantor, or otherwise, for the bankrupt, shall be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct.

SECTION 5092. At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and he shall also produce and file vouchers for all payments for which vouchers are required by any rule of the court; he shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the

whole estate of the bankrupt as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, and showing what debts or claims are yet undetermined, and what sum remains in his hands. The majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one-half in value of the creditors attend the meeting, either in person or by attorney, it shall be the duty of the assignee so to determine.

SECTION 5093. Like proceedings shall be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of creditors shall then be called by the court, and a final dividend then declared, unless any suit at law or in equity is pending, or unless some other estate or effects of the debtor afterward come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate and effects into money, and within two months after the same are so converted they shall be divided in manner aforesaid. Further dividends shall be made in like manner as often as occasion requires, and after the third meeting of creditors no further meeting shall be called, unless ordered by the court.

SECTION 5094. The assignee shall give such notice to all known creditors, by mail or otherwise, of all meetings, after the first, as may be ordered by the court.

SECTION 5095. Any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

SECTION 5096. Preparatory to the final dividend, the assignee shall submit his account to the court, and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and the assignee shall, if required by the court, be examined as to the truth of his account, and if it is found correct he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt. The court shall thereupon order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their debts.

SECTION 5097. No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter:

SECTION 5098. If by accident, mistake, or other cause, without fault of the assignee, either or both of the second and third meetings should not be held within the times limited, the court

may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if the meeting had been duly held.

SECTION 5099. The assignee shall be allowed, and may retain out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court.

SECTION 5100. In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars. If, at any time, there is not in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him.

SECTION 5101. In the order for a dividend, the following claims shall be entitled to priority, and to be first paid in full, in the following order:

*First.* The fees, costs, and expenses of suits, and of the several proceeding in bankruptcy under this title, and for the custody of property, as herein provided.

*Second.* All debts due to the United States, and all taxes and assessments under the laws thereof.

*Third.* All debts due to the state in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof.

*Fourth.* Wages due to any operative, clerk, or house-servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

*Fifth.* All debts due to any persons who, by the laws of the United States, are, or may be, entitled to a priority, in like manner as if the provisions of this title had not been adopted. But nothing contained in this title shall interfere with the assessment and collection of taxes by the authority of the United States or any state.

SECTION 5102. Whenever a dividend is ordered, the register shall, within ten days after the meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward, by mail, to every creditor a statement of the dividend to which he is entitled, and such creditors shall be paid by the assignee in such manner as the court may direct.

SECTION 5103. If at the first meeting of creditors, or at any meeting of creditors specially called for that purpose, and of

which previous notice shall have been given for such length of time and in such manner as the court may direct, three fourths in value of the creditors whose claims have been proved shall resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt shall be settled by trustees, under the inspection and direction of a committee of the creditors, the creditors may certify and report such resolution to the court, and may nominate one or more trustees to take hold and distribute the estate, under the direction of such committee. If it appears, after hearing the bankrupt and such creditors as desire to be heard, that the resolution was duly passed, and that the interests of the creditors will be promoted thereby, the court shall confirm it; and upon the execution and filing, by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt shall be wound up and settled by trustees, according to the terms of such resolution, the bankrupt, or, if an assignee has been appointed, the assignee, shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done, had such resolution not been passed. Such consent and the proceedings under it shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it. The court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors, and the trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors; and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy; and the trustees shall have all the rights and powers of assignees in bankruptcy. The court, on the application of such trustees, shall have power to summon and examine, on oath or otherwise, the bankrupt, or any creditor, or any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers in the same manner as in other proceedings in bankruptcy; and the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this title. If the resolution is not duly reported, or the consent of the creditors is not duly filed, or if, upon its filing, the court does not think fit to approve thereof, the

bankruptcy shall proceed as if no resolution had been passed, and the court may make all necessary orders for resuming the proceedings. And the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this title.

#### PROTECTION AND DISCHARGE OF BANKRUPTS.

SECTION 5104. The bankrupt shall at all times, until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated. For neglect or refusal to obey any order of the court, the bankrupt may be committed and punished as for a contempt of court. If the bankrupt is without the district, and unable to return and personally attend at any of the times or do any of the acts which may be required pursuant to this section, and if it appears that such absence was not caused by wilful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted so to do, with like effect as if he had not been in default.

SECTION 5105. No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby.

SECTION 5106. No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtors discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed.

SECTION 5107. No bankrupt shall be liable during the pendency of the proceedings in bankruptcy to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.

SECTION 5108. *[At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands*

*of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts.* [At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and before the final disposition of the cause, the bankrupt may apply to the court for a discharge from his debts. This section shall apply in all cases heretofore or hereafter commenced.]

SECTION 5109. Upon application for a discharge being made, the court shall order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt.

SECTION 5110. No discharge shall be granted, or, if granted, shall be valid, in any of the following cases:

*First.* If the bankrupt has willfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact.

*Second.* If the bankrupt has concealed any part of his estate or effects, or any books or writings relating thereto, or has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this title, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof.

*Third.* If, within four months before the commencement of such proceedings, the bankrupt has procured his lands, goods, money, or chattels to be attached, sequestered, or seized on execution.

*Fourth.* If, at any time after the second day of March, eighteen hundred and sixty-seven, the bankrupt has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; or has removed or caused to be removed any part of his property from the district, with intent to defraud his creditors.

*Fifth.* If the bankrupt has given any fraudulent preference contrary to the provisions of the act of March two, eighteen hundred and sixty-seven, to establish a uniform system of bankruptcy, or to the provisions of this title, or has made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate.

*Sixth.* If the bankrupt, having knowledge that any person has proved such false or fictitious debt, has not disclosed the same to his assignee within one month after such knowledge.

*Seventh.* If the bankrupt, being a merchant or tradesman, has not, at all times after the second day of March, eighteen hundred and sixty-seven, kept proper books of account.

*Eighth.* If the bankrupt, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation.

*Ninth.* If the bankrupt has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed in satisfaction of his debts.

*Tenth.* If the bankrupt has been convicted of any misdemeanor under this title.

SECTION 5111. Any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in its discretion order any question of fact so presented to be tried at a stated session of the district court.

SECTION 5112. In all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, is filed in the case at or before the time of the hearing of the application for discharge; but this provision shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the first day of January, eighteen hundred and sixty-nine.

SECTION 5113. Before any discharge is granted, the bankrupt must take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified as a ground for withholding such discharge, or as invalidating such discharge if granted.

SECTION 5114. If it shall appear to the court that the bankrupt has in all things conformed to his duty under this title, and that he is entitled, under the provisions thereof, to receive a discharge, the court shall grant him a discharge from all his debts except as hereinafter provided, and shall give him a certificate thereof under the seal of the court.

SECTION 5115. The certificate of a discharge in bankruptcy shall be in substance in the following form: District Court of the United States, district of . . . . . Whereas . . . . . has been duly



adjudged a bankrupt under the Revised Statutes of the United States, Title "BANKRUPTCY," and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said.....be forever discharge from all debts and claims which by said Title are made provable against his estate, and which existed on the.....day of....., on which day the petition for adjudication was filed by (or against) him; excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy. Given under my hand and the seal of the court at....., in the said district, this..... day of.....,

(Seal.)

....., Judge.

SECTION 5116. No person who has been discharged, and afterward becomes bankrupt on his own application, shall be again entitled to a discharge whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three-fourths in value of his creditors who have proved their claims is filed at or before the time of application for discharge; but a bankrupt who proves to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

SECTION 5117. No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.

SECTION 5118. No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint-contractor, indorser, surety, or otherwise.

SECTION 5119. A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands. The certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge.

SECTION 5120. Any creditor of a bankrupt, whose debt was proved or provable against the estate in bankruptcy, who desires to contest the validity of the discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to annul the same. The application shall be in writing, and shall specify which, in particular, of the several acts mentioned in section fifty-one hundred and ten it is intended to prove against the bankrupt, and set forth the grounds of avoidance; and no evi-

dence shall be admitted as to any other of such acts; but the application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of the application to be given to the bankrupt, and order him to appear and answer the same, within such time as to the court shall seem proper. If, upon the hearing of the parties, the court finds that the fraudulent acts, or any of them, set forth by the creditor against the bankrupt, are proved, and that the creditor had no knowledge of the same until after the granting of the discharge, judgment shall be given in favor of the creditor, and the discharge of the bankrupt shall be annulled. But if the court finds that the fraudulent acts and all of them so set forth are not proved, or that they were known to the creditor before the granting of the discharge, judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by the proceedings.

#### PROCEEDINGS PECULIAR TO PARTNERSHIPS AND CORPORATIONS.

SECTION 5121. Where two or more persons who are partners in trade are adjudged bankrupt, either on the petition of such partners or of any one of them, or on the petition of any creditor of the partners, a warrant shall issue, in the manner provided by this title, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted. All the creditors of the company, and the separate creditors of each partner, may prove their respective debts. The assignee shall be chosen by the creditors of the company. He shall keep separate accounts of the joint stock or property of the copartnership and of the separate estate of each member thereof; and after deducting out of the whole amount received by the assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. If there is any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there is any balance of the joint stock after payment of the joint debts, such balance shall be appropriated to and divided among the separate estates of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts. The certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone. In all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. If such copartners reside in different districts,

that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

SECTION 5122. The provisions of this title shall apply to all moneyed business or commercial corporations and joint stock companies, and upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor of such corporation or company, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors. All the provisions of this title which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties apply to each and every officer of such corporations or company in relation to the same matters concerning the corporation or company, and the money and property thereof. All payments, conveyances and assignments declared fraudulent and void by this title when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. Whenever any corporation by proceedings under this title is declared bankrupt all its property and assets shall be distributed to the creditors of such corporation in the manner provided in this title in respect to natural persons. But no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof.

SECTION 5123. Whenever a corporation created by the laws of any state, whose business is carried on wholly within the state creating the same, and also any insurance company so created, whether all its business shall be carried on in such state or not, has had proceedings duly commenced against such corporation or company before the courts of such state for the purpose of winding up the affairs of such corporation or company and dividing its assets ratably among its creditors and lawfully among those entitled thereto prior to proceedings having been commenced against such corporation or company under the bankrupt laws of the United States, any order made, or that shall be made, by such court agreeably to the state law for the ratable distribution or payment of any dividend of assets to the creditors of such corporation or company while such state court shall remain actually or constructively in possession or control of the assets of such corporation or company shall be deemed valid notwithstanding proceedings in bankruptcy may have been commenced and be pending against such corporation or company.

#### PROHIBITED AND FRAUDULENT TRANSFERS.

SECTION 5128. If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to

any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited.

SECTION 5129. If any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this [act] [title,] or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this title, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt.

SECTION 5130. The fact that such a payment, pledge, sale, assignment, transfer, conveyance, or other disposition of a debtor's property as is described in the two preceding sections, is not made in the usual and ordinary course of business of the debtor, shall be prima facie evidence of fraud.

SECTION 5131. Any contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void; and any creditor who obtains any sum of money or other goods, chattels, or security from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained, to be recovered by the assignee for the benefit of the estate.

SECTION 5132. Every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or upon that of a creditor:

*First.* Who secretes or conceals any property belonging to his estate; or,

*Second.* Who parts with, conceals, destroys, alters, mutilates, or falsifies, or causes to be concealed, destroyed, altered, muti-

lated, or falsified, any book, deed, document, or writing relating thereto; or,

*Third.* Who removes or causes to be removed any such property or book, deed, document, or writing out of the district, or otherwise disposes of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay him in recovering or receiving the same; or,

*Fourth.* Who makes any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate with the like intent; or,

*Fifth.* Who spends any property belonging to his estate in gaming; or,

*Sixth.* Who, with intent to defraud, willfully and fraudulently conceals from his assignee or omits from his inventory any property or effects required by this title to be described therein; or,

*Seventh.* Who, having reason to suspect that any other person has proved a false or fictitious debt against his estate, fails to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or,

*Eighth.* Who attempts to account for any of his property by fictitious losses or expenses; or,

*Ninth.* Who, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud; or,

*Tenth.* Who, within three months next before the commencement of proceedings in bankruptcy, with intent to defraud his creditors, pawns, pledges, or disposes of, otherwise than by transactions made in good faith in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for,

Shall be punishable by imprisonment, with or without hard labor, for not more than three years.



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